314 U.S. 709
18
Office - Supreme Court, U. S.
FILED
JUN 20 1941
CHARLES ELMORE CROPLEY
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 196

H. W. FERGUSON, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CORCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

HARRY P. LAWTHER,
MAURY HUGHES,
WM. M. CRAMER,
Counsel for Petitioner.

E. Duncan & Co., Brief Printers, Dallas

SUBJECT INDEX

		Page
A.	QUESTION INVOLVED	1- 2
B.	STATEMENT OF THE CASE	2- 4
C.	THE PROCEEDINGS	4- 8
D.	JURISDICTION	8
E.	REASONS RELIED ON FOR ALLOWANCE OF THE WRIT	8-14
F.	APPENDIX	15
G.	BRIEF IN SUPPORT OF PETITION ARGUMENT:	
	(1) Erroneous Instructions of The District Judge	1
	(2) Circuit Court of Appeals erred In Approving the Charge of the District Judge	7
	(3) Prayer for Granting the Writ	15

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No.———

H. W. FERGUSON, *Petitioner*,

VS.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CORCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable the Supreme Court of the United States:

The petition of H. W. Ferguson respectfully shows:

QUESTION INVOLVED

Was the President of a Joint Stock Land Bank organized and operating under the Federal Farm Loan Act,

who purchased with his wife's money and for her benefit from the fee owner a tract of land encumbered with a lien to secure a loan made by the bank, guilty of embezzling and abstracting the moneys of the Bank under Section 984, Title 12, U. S. C. A., when he collected the profits from the investment and paid them over to his wife, the lien of the Bank having been kept alive and in full force and effect until the Bank's loan was finally paid off in full, principal and interest, and the Bank lost nothing by reason of the transaction?

STATEMENT OF THE CASE

Your petitioner was indicted in the District Court for the Northern District of Texas for a violation of Section 984, Title 12, U. S. C. A., was found guilty on five counts in the indictment (the first count having been by the District Judge withdrawn from the consideration of the jury), and was sentenced to serve eighteen months in Leavenworth and to pay a fine of ten thousand dollars generally on all counts of the indictment as charged. On appeal the United States Circuit Court of Appeals for the Fifth Circuit affirmed.

The applicable parts of the Statute are as follows, (the Statute in full is set out in the appendix.)

> "Any person connected in any capacity with any . . . joint stock land bank, who embezzles, abstracts or wilfully misapplies any moneys, funds or credits thereof . . . with intent to defraud such institution . . . shall be punished by a fine of not ex-

ceeding $5000.00, or by imprisonment not exceeding five years, or both."

The record on the first appeal of this case, (112 Fed. (2d) 132) was identical with that on the present appeal, and the statement made by the Circuit Court of Appeals on said first appeal is applicable here; and is correct with the following exceptions:

(1) The Court was in error when it said "*When a purchaser could not be found* the clerk would convey title to the Bank, which would close the loan record and put the land in the real estate account."

The fact proven was that the custom—the invariable rule—was, not when a purchaser could not be found, but that simultaneously with the deed from the borrower and owner of the land to the clerk a deed was prepared and signed by the clerk conveying title to the Bank; the loan record was at once closed and the land put into the real estate account. This for the protection of the Bank. This deed was not put of record but was kept in the files of the Bank. (R. 53-54-55).

In the instant case the deed from the owner of the land was not made to a clerk in the office of the Bank. It was made to a long time friend and business associate of Ferguson, S. K. Fowler, a farmer on a large scale who lived in the county where the land lay; no deed was prepared for Fowler conveying title to the Bank; and no deed was ever executed by Fowler conveying title to the Bank. The loan record in the Bank

was not closed nor was the land put into the real estate account. (R. 305-306-371-373).

(2) In its opinion the court says "according to Ferguson the Bank was to credit the $1000.00 paid by Mrs. Berkman for her release, and retain the balance of the loan as its investment, Fowler taking title subject to the loan for the benefit of Ferguson's wife."

Ferguson not only so testified, but the uncontradicted written evidence in the case introduced by the Government viz: (1) the release from the Bank to Mrs. Berkman (R. 38); (2) the deed from Mrs. Berkman to Fowler, (R. 83), and (3) the deed from Fowler to Deutschman, (R. 134-135), each in express terms provided that the Berkman note and the lien on the land securing the same were kept in full force and effect. It follows as a fact proven that the deed from Mrs. Berkman to Fowler was not in cancellation and satisfaction of the Berkman note and the lien on the land securing the same. Not being in such satisfaction, were Fowler the nominee of the Bank in the deed from Mrs. Berkman—were he holding title for the Bank—the conveyance was without consideration. The record shows that neither Fowler nor the Bank paid to Mrs. Berkman a thin dime for her execution of the deed to Fowler.

THE PROCEEDINGS

Upon the conclusion of the evidence your petitioner, in his special requested charge No. 1, requested the Dis-

trict Judge to instruct the jury to return a verdict of "Not Guilty".

This was by the Court refused. (R. 11).

Thereupon your petitioner requested the District Judge to instruct the jury "If you find and believe from the evidence that *in the beginning* and prior to directing that the deed be made from Mrs. Berkman to Fowler, having already determined that the Bank did not wish and would not take the land but would retain only its lien, that the defendant Ferguson, acting for his wife, had formed the purpose to pay to the Bank the amount of money necessary to satisfy all of Mrs. Berkman's delinquencies and to put the loan in good standing and to have the title put in Fowler's name for his wife's benefit, then you will find the defendant Ferguson "not guilty".

This instruction was by the District Judge refused. (R. 12). Thereupon your petitioner requested the court to instruct the jury; "You are instructed that it is incumbent upon the Government to prove beyond a reasonable doubt that at the time H. W. Ferguson received the $2400.00 set out in the second court in the indictment, he did so knowing that the same belonged to the Land Bank; and if the Government has failed to so prove said fact, you will find the defendant 'Not Guilty' on said count."

This requested instruction was by the court refused. (R. 13).

Thereupon your petitioner requested the District Judge to instruct the jury, "Good faith of a defendant in a prosecution for misapplying, abstracting and converting to his own use certain moneys of the Dallas Joint Stock Land Bank is a complete defense. If, therefore, you find and believe from the evidence that the defendant Ferguson, in collecting and paying over to his wife the various sums of money, the proceeds of the Berkman farm, as set out in the indictment, did so in good faith, believing that said moneys were the property of his wife, then you will find him 'Not Guilty' ".

This instruction was by the court given. (R. 13).

Thereupon your petitioner requested the District Judge to instruct the jury, "You are instructed that it is incumbent on the Government to prove beyond a reasonable doubt that at the time the land in question herein went into the name of S. K. Fowler that it was H. W. Ferguson's intent and purpose that same should at the time be henceforth held by him as trustee for the Land Bank; and if the Government has failed to so prove said fact, you will find the defendant H. W. Ferguson 'Not Guilty' ".

This instruction was by the court given. (R. 14). Thereupon the District Judge delivered his charge to the jury. (R. 462-474).

Thereafter the jury returned into court the following verdict, "We, the jury, find the defendant guilty on all counts in the indictment". (R. 14).

Upon said verdict the District Court entered the following judgment.

> "On this 30th day of September, 1940, came the United States Attorney and the defendant, H. W. Ferguson, appeared in proper person and by counsel; and the defendant having been convicted on verdict of guilty of the offenses charged in the indictment in the above entitled cause to-wit; embezzlement from the Dallas Joint Stock Land Bank of Dallas, a National Farm Loan Association, and conspiracy . . .
>
> "It is by the Court ordered and adjudged that the defendant having been found guilty of said offenses is hereby committed to the custody of the attorney general for imprisonment in an institution of the Penitentiary type to be designated by the attorney general or his authorized representative for the period of eighteen months in the United States penitentiary, Leavenworth, Kansas, and a fine of ten thousand ($10,000.00) Dollars generally on all counts in the indictment as charged; and that said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law. It is further ordered that the clerk deliver a certified copy of the judgment and commitment to the United States Marshall or other qualified officer and that same shall serve as the commitment herein." (R. 16-17).

Defendant Ferguson filed a Motion for a New Trial. (R. 484-492).

The District Judge overruled said Motion for New Trial. (R. 493-494), giving at length his reasons for said action. (R. 495-497).

Defendant Ferguson perfected his appeal to United States Circuit Court of Appeals for the Fifth Circuit. (R. 502-513-493-494-498-513-514-515-516-524). Said United States Circuit Court of Appeals affirmed the judgment of the District Court May 6th, 1941. (R. .....).

Your petitioner filed a petition for Re-Hearing, (R. .....). Said petition was by said Circuit Court of Appeals denied, May 31st, 1941. (R. .....).

JURISDICTION

The jurisdiction of this court to issue the writ prayed for is conferred by the Act of Feb. 13th, 1925, Chapter 229, Sec. 1, Title 28, U.S.C. Sec. 347; Judicial Code Section 240, as amended; Act of February 24th, 1933, as amended March 8th, 1934, Title 28 U.S.C. Section 723(a); and Rule XI of the Rules of Practice and Procedure in this Court formulated May 7th, 1934.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Honorable The United States Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with Its Own Decision on the same matter, of date May 31st, 1940. (112 Fed. (2d) 132.)

In its decision of May 6th, 1941, the Honorable Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial

proceeding, or has so far sanctioned such a departure by the United States District Court for the Northern District of Texas, as to call for the exercise of This Court's power of supervision, in this:

The record in this case indicates that the United States District Judge erroneously was of the opinion that the President of a joint stock land bank organized and operating under the Federal Farm Loan Act, could not legally purchase, with his wife's funds, and for her benefit, a tract of land upon which the joint stock land bank had a lien to secure the payment of a loan made by the Bank to the owner of the land; and that by making said purchase he was guilty of embezzling and abstracting the funds of the Bank in violation of Sec. 984, Title 12, U. S. C., when he collected the revenues from the land and the profits of the investment and paid the same to his wife instead of to the Bank; and this, although the Bank's security was not lessened nor endangered; but was kept alive and in full force and effect until the Bank's loan was finally paid off in full, principal and interest, and the Bank had lost nothing by reason of the transaction.

By affirming the judgment of the United States District Court the Circuit Court of Appeals erroneously approved and sanctioned this opinion of the United States District Judge.

Upon the trial the Honorable the United States District Judge in his charge to the jury erroneously instructed them:

(1) "It appears from the uncontroverted facts in the case and as set out in the indictment . . . In this situation she (Mrs. Berkman) offered to give the Bank the land and $1000.00 besides if they would release her of the debt. The evidence shows or tends to show that the defendant Ferguson considered the land a fairly good prospect and accepted the proposition and accepted it in this form: that instead of conveying the land directly to the Bank it was to be conveyed to a person to be named by the Bank called a nominee; that nominee was S. F. Fowler." (R. 463).

This identical instruction was given upon the first trial of this case and was condemned by the Circuit Court of Appeals in the following language:

"But we think the court, impressed with Ferguson's accountability in equity as an agent and fiduciary of the Bank, erroneously made and refused charges on the critical question. In stating the uncontroverted facts he said that instead of conveying the land directly to the Bank they conveyed it to a person to be named by the Bank called a nominee for the Bank. That nominee was S. K. Fowler. Thus in the very beginning the jury was told that Fowler took for the Bank and not for Ferguson." (112 Fed. (2d) 132).

(2) "The defendant Ferguson was President of the Bank and as such was without power to take anything that was the Bank's and name someone as trustee to hold for him personally or for his wife." (R. 465).

This identical instruction was by the District Judge given to the jury on the first trial and was condemned

by the Circuit Court of Appeals in the following language:

> "This last sentence (Ferguson was without power to take anything that was the Bank's and name someone as trustee to hold for him personally, or for his wife) while true of anything that was really the Bank's, would be understood in the connection in which it was spoken as meaning that the land before it was deeded to Fowler was the Bank's and Ferguson was therefore without power to make Fowler his trustee."

And finally in reversing and remanding the cause the Circuit Court of Appeals said:

> "While the Charge in other parts of it submitted the vital issues to the jury, we think the parts of it we have criticised obscured them and tended to impress the jury with the idea that Ferguson's position of trust prevented any possibility of the land and the monies arising from it belonging to anyone but the Bank." (112 Fed. (2d) 132).

In addition to the foregoing instructions which had been given and adjudged erroneous by the Circuit Court of Appeals the Honorable United States District Judge erroneously instructed the jury as follows:

> "One acting as President of a Bank *is not at liberty to deal with the property of the bank* as though it were his own. It is his duty to keep in mind always the financial or pecuniary interests of the stockholders of such institution or those for whom he acts and in the exercise of this duty he should give the bank's interests preference over

his personal interest wherever there should be a conflict or he should refuse to act at all.

"And if the President of a Bank fails in the performance of this duty and uses opportunities that come before him to appropriate the *proceeds* of *property rightfully belonging to the Bank*, then the Bank acting through the directors and stockholders could at its election hold the President liable in equity for any profits he made *in thus dealing personally in a matter in which he should have dealt* for *the Bank alone*." (R. 468).

He further instructed the jury:

"An essential element of the offense is the intent to defraud. The circumstances surrounding it may be considered the conduct which may appear as tending to aid you in finding and discovering and in connection with this unless the testimony satisfies you to the contrary, you are warranted in holding a party responsible for the natural and probable and legitimate consequences of his acts. That is what is presumed in every case a man means. The defendant's intent to defraud the Bank is an indispensable element of each offense charged in the indictment. It is a presumption of law that one intends the natural and probable effect of the act he intentionally does. The presumption may be overcome by evidence. The defendant's testimony as to his intent and his explanation of his act and omission are competent and material evidence on the subject of his intent. Acts, however, are sometimes more persuasive evidence of intent than words. It is your duty to consider all the evidence; all of the acts and omissions and doings of the defendant, the

presumption that one intends the natural and probable effect of his act intentionally done." (R. 467-468).

And finally the Honorable District Judge erroneously charged the jury:

> "You are instructed in this connection that if the defendant Ferguson, knowing or believing that the Berkman land would probably result in yielding a profit over and above the indebtedness caused it to be handled in the name of Fowler for the purpose of realizing this profit personally and diverting it to his wife rather than the Bank, and that the use of Fowler's name and the manner in which the transaction was handled was intended only as a subterfuge then the defendant Ferguson when he received profits from such property would be guilty of abstracting the same from the Bank. On the other hand if it was placed in Fowler's name for Mrs. Ferguson in good faith and handled as a bona fide transaction and not as a subterfuge it would not be an act of abstracting money from the Bank." (R. 468).

The Honorable the Circuit Court of Appeals for the Fifth Circuit in its present opinion reviewing the entire Charge of the United States District Judge erroneously held:

> "At the request of the defendant the Court gave two special charges which stated the issues in a light most favorable to Ferguson. We have carefully read and considered the entire charge of the court and have found that it contains no error prejudicial to the rights of this appellant." (R. .....).

WHEREFORE your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the Seal of This Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9706, H. W. Ferguson, Appellant vs. The United States of America, Appellee, and that the said judgment of The Circuit Court of Appeals for the Fifth Circuit may be reversed by This Honorable Court and that your petitioner may have such other and further relief in the premises as to This Honorable Court may seem meet and just.

Respectfully submitted,

H. W. FERGUSON, by
HARRY P. LAWTHER,
MAURY HUGHES,
WM. M. CRAMER,
Counsel for Petitioner.

APPENDIX

STATUTE APPLICABLE

Sec. 984, Title 12, U. S. C.

Any person connected in any capacity with any national farm loan association, Federal land bank, or joint stock land bank, who embezzles, abstracts, or willfully misapplies any moneys, funds, or credits thereof, or who without authority from the directors draws any order, assigns any note, bond, draft, mortgage, judgment, or decree thereof, or who makes any false entry in any book, report, or statement of such association or land bank with intent in either case to defraud such institution or any other company, body politic or corporate, or any individual person, or to deceive any officer of a national farm loan association or land bank or any agent appointed to examine into the affairs of any such association or bank, and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding five years, or both.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No.———

H. W. FERGUSON, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I.

The Honorable Circuit Court of Appeals entirely misunderstood the point in your petitioner's request for an instructed verdict.

The Court said:

> "There is no merit in the contention that the Court erred in refusing to instruct the jury to return a verdict of not guilty. * * * On all the evi-

dence Ferguson was not entitled to an instructed verdict of not guilty."

The rule that a conflict in the testimony is a question exclusively for the jury and that a Federal Appellate Court will not inquire into or measure the weight of the conflicting evidence is elementary; and had the vital issue in the case, viz: was the land from which all the monies were derived the property of the Bank depended upon whether Ferguson or McCombs were telling the truth, Ferguson was not entitled to an instructed verdict.

But facts proven in the case were (1) the custom of the Bank where a borrowing land owner was in default and financially unable to meet his obligation and there was no alternative but for the Bank to take over the security, was to have a deed made by said land owner to a clerk in the Bank who would hold title for the Bank; (R. 411); (2) In the instant case, the deed from the borrowing land owner was not made to a clerk in the Bank; but was made to S. K. Fowler, a farmer on a large scale living in the County where the land lay, who was in no way connected with the Bank, (R. 83); (3) Where title was taken in the name of a clerk in the Bank to hold for the Bank the universal rule, for the protection of the Bank, was for the clerk to simultaneously execute a deed to the land to the Bank; upon which the loan record in the Bank of the borrower was closed and the land put into the real estate account (R. 53-412); (4) In the instant case,

no deed was prepared for Fowler, conveying the land to the Bank; and no deed was ever executed by Fowler conveying title to the Bank; the Berkman loan record in the Bank was not closed; nor was the Berkman land put into the real estate account in the Bank, (R. 302-303-304-305); (5) McCombs, the attorney who handled the Berkman-Fowler transaction for the Bank and who received from Mrs. Berkman's attorney the deed which she had executed to Fowler, by letter, dated April 5th, 1937, transmitted said deed to H. W. Ferguson personally, with the inquiry, "if either you or Mr. Fowler wants an opinion from me as to *his title*, please let me know so I may order the necessary documents and have them filed for record in Nueces County and included in a supplement." (R. 56); (6) On the same day, April 5, 1937, McCombs wrote to the Bank enclosing Mrs. Berkman's check for $1000.00; a release to be executed by the Bank to Mrs. Berkman of all personal liability; and concluding "*The title to this property is now vested in S. K. Fowler, Corpus Christi, Texas, subject to the lien in favor of the Bank.*" (R. 36-37); (7) The clerks in the Bank upon receipt of this letter and upon its authority noted on the loan record "Change of ownership Mrs. Carrie Berkman to S. K. Fowler, Corpus Christi, Texas." (R. 371-302-303-304-305); (8) McCombs, a witness for the government, admitted under oath that in July, 1938, he stated to one John Pope, an attorney, in the presence of Pool, the Secretary of the Bank, "I know all about that transaction. I han-

dled the whole thing, and I know that the deed to Fowler was not made in trust for the Bank". And that a week later, in the presence of Ferguson, he stated to the same John Pope that "He knew all about the Berkman transaction; that he had handled the whole thing; that the Bank had no interest in the land; and that Fowler was not holding it as trustee for the Bank". (R. 262-265). (9) The release from the Bank to Mrs. Berkman prepared by this same McCombs provided; "But with the distinct understanding and agreement that said note (the Berkman note for $9600.00) shall remain in full force and effect and the lien securing same shall remain in full force and effect". (R. 39). (10) The deed from Mrs. Carrie Berkman to S. K. Fowler also prepared by McCombs recited that it was made "subject to the balance due on that certain promissory note dated September 1st, 1925, in the principal sum of $9600.00, executed by Andrew Berkman and Carrie Berkman to the order of the Dallas Joint Stock Land Bank of Dallas . . . and fully described in a deed of trust of same date to H. W. Ferguson, Trustee, now of record in Nueces County, Texas, in Vol. 32, pp. 599-603; Deed of Trust Records; and subject to all unpaid taxes against the land." (R. 83). (11) In the deed from Fowler to Deutschman, Deutschman assumed the Berkman indebtedness. (R. 134). (12) Deutschman paid to the Bank the balance due on the Berkman note, principal and interest, in January, 1938. (R. 135).

This evidence being all uncontroverted, constituted facts proven in the case, from which it followed, as a

matter of law, that the land did not belong to the Bank before Mrs. Berkman deeded the same to Fowler, and did not become the property of the Bank by her deed to S. K. Fowler March 30th, 1937. On that date the Berkman note and the lien on the land securing the same were in full force and effect. By express provision in the release from the Bank to Mrs. Berkman, in the deed from Mrs. Berkman to Fowler; and in the deed from Fowler to Deutschman, said Berkman note and the lien on the land securing the same were kept in full force and effect until the balance of the note was paid off in full by Deutschman in January, 1938. During this time the interest of the Bank in the land was that of a lienholder to secure a loan of money made by the Bank to the owner of the land.

Had the land become the property of the Bank by the deed from Mrs. Berkman, the fee owner, to Fowler, its title as lienholder would have become merged in its fee ownership of the land—would have been extinguished —would have ceased to exist—according to an elementary rule of real estate law that where the owner of a lesser estate in land acquires a greater estate in the same land the lesser estate is merged in the greater.

Facts proven in this case were that the Bank's title as a lienholder in the land was not extinguished—did not cease to exist—but was kept alive and in full force and effect.

The proposition of the government that the Bank, by the deed from Mrs. Berkman to Fowler, became the fee owner of the land and at the same time continued to be the owner and holder of a deed of trust lien on the same land in full force and effect securing a note in full force and effect payable to itself, is a legal absurdity.

In view of the foregoing facts proven in the case, as a matter of law, the Berkman tract of land never was and never became the property of the Bank; and the conflict between the testimony of Ferguson and McCombs became immaterial. True, the testimony of Ferguson that he directed McCombs to have Mrs. Berkman execute a deed to Fowler for the benefit of Mrs. Ferguson was consistent with the uncontroverted evidence in the case; while the testimony of McCombs that Ferguson instructed him to have Mrs. Berkman make the deed to Fowler for the benefit of the Bank, was inconsistent with all of said evidence.

But This Court will not review the evidence.

Suffice it to say that McCombs' testimony was so contradicted by all the facts proven in the case; by his own letters, actions and conduct; and by his own admissions under oath, as to be of no probative force, and not entitled to go to the jury for its consideration.

The District Judge erred in refusing to instruct the jury to return a verdict of not guilty. The Circuit Court of Appeals erred in holding; "On all the evidence

Ferguson was not entitled to an instructed verdict of not guilty."

II.

Likewise The Circuit Court of Appeals wholly misconceived the import and effect of the District Court's entire charge when it said:

> "The appellant complains that the Court again committed reversible error in its instructions to the jury and that the erroneous instructions adverted to in our former opinion were in effect and substance given to the jury on the second trial. At the request of the defendant the Court gave two special charges which stated the issues in a light most favorable to Ferguson. We have carefully read and considered the entire charge of the Court and have found that it contains no error prejudicial to the rights of this appellant."

The two requested special charges referred to were (1) a charge on good faith, and (2) one that it was incumbent on the government to prove beyond a reasonable doubt that at the time the land in question went into the name of Fowler that it was H. W. Ferguson's intent and purpose that the same should at the time be henceforth held by him as trustee for the land bank. (R. 474).

These requested special charges did not offset and cure the previous erroneous and prejudicial instructions in the Court's charge.

On the contrary, said erroneous and prejudicial instructions wholly nullified any benefit to your petitioner from said requested charges and rendered the same of no effect whatever.

The District Judge charged the jury

> First: "It appears from the uncontroverted facts in the case as set out in the indictment . . . the evidence shows or tends to show that the defendant Ferguson considered the land a fairly good prospect and accepted the proposition and accepted it in this form; that instead of conveying the land directly to the Bank it was to be conveyed to a person to be named by the Bank, called a nominee; that nominee was S. K. Fowler." (R. 463).

This same instruction was given to the jury by the same District Judge on the first trial of the case; and was condemned by this same Circuit Court of Appeals in the following language:

> "But we think the Court, impressed with Ferguson's accountability in equity as an agent and fiduciary of the Bank, erroneously made and refused charges on the critical question. In stating the uncontroverted facts he said that instead of conveying the land directly to the Bank they conveyed to a person to be named by the Bank called a nominee for the Bank. That nominee was S. K. Fowler. Thus in the very beginning the jury was told that Fowler took for the Bank and not for Ferguson." (112 Fed. (2d) 132).

> Second: "The defendant Ferguson was President of the Bank and as such was without power

to take anything that was the Bank's and name someone as trustee to hold for him personally or for his wife." (R. 465).

This identical instruction was given to the jury on the first trial by this same District Judge and was held erroneous by this same Circuit Court of Appeals in the following language:

> "This last sentence (Ferguson was without power to take anything that was the Bank's and name someone as trustee to hold for him personally or for his wife), while true of anything that was really the Bank's, would be understood in the connection in which it was spoken as meaning that the land before it was deeded to Fowler was the Bank's and Ferguson was therefore without power to make Fowler his trustee."

In reversing and remanding the case the Circuit Court of Appeals said:

> "While the charge in other parts of it submitted the vital issues to the jury we think the parts of it we have criticiser obscured them and tended to impress the jury with the idea that Ferguson's position of trust prevented any possibility of the land and the monies arising from it belonging to anyone but the Bank." (112 Fed. (2d) 132).

Third: The same United States District Judge on the present trial, in addition to repeating instructions which had been held erroneous by the Circuit Court of Appeals in this charge, reiterated language which had

been condemned by the Circuit Court of Appeals when he further instructed the jury:

> "One acting as President of a Bank is not *at liberty to deal with the property of the Bank as* though it were his own . . . And if the President of a Bank fails in the performance of this duty and *uses opportunities that come before him to appropriate* the *proceeds of property rightfully belonging* to the Bank then the Bank acting through the directors and stockholders could at its election hold the President liable in equity for any profits he made *in thus dealing personally in a matter in which he should have dealt for the Bank alone.*" (R. 468).

As stated by the Circuit Court of Appeals with reference to the preceding instruction, the jury could only have understood by this language in the connection in which it was used as meaning that the land before it was deeded to Fowler belonged to the Bank and that Ferguson was not at liberty to deal with it as though it were his own; that the proceeds of said land rightfully belonged to the Bank and that the Bank could hold him liable in equity for any profits which he made in dealing with the land personally when he should have dealt with the same for the Bank alone.

Fourth: The District Judge further told the jury that

> ". . . the defendant's intent to defraud the Bank was an indispensable element of each offense charged in the indictment. That it was a presumption of law that one intended the natural and

probable effect of the act he intentionally did. . . . that the defendant's testimony as to his intent and his explanation of his act and omission were competent and material evidence on the subject of his intent. That acts however were sometimes more persuasive evidence of intent than words. And that it was the jury's duty to consider all the evidence; all of the acts and omissions and doings of the defendant; that presumption that one intended the natural and probable effect of his act intentionally done." (R. 467-468).

This instruction following the instructions heretofore set out wherein the jury were told (1) that in the deed from Mrs. Berkman to Fowler, Fowler was the nominee of the Bank—held the land for the Bank; (2) That Ferguson as President of the Bank was without power to take anything that was the Bank's and name someone as trustee for himself personally or for his wife. (3) That Ferguson as President of the Bank was not at liberty to deal with the property of the Bank (the Berkman land), as though it were his own. (4) That if he did and appropriated the proceeds of property rightfully belonging to the Bank, the Bank could hold him liable in equity for any profits he had thus made.

Following these instructions the jury could only have understood by this instruction that Ferguson's act in directing that the deed from Mrs. Berkman be made to Fowler for the benefit of his wife; and that his act in collecting the proceeds from the land and paying the

same over to his wife instead of to the Bank were more persuasive evidence of his intent to defraud the Bank than any words he might say in explanation of his said acts.

Fifth: Finally the District Judge instructed the jury:

> "You are instructed in this connection that if the defendant Ferguson, knowing or believing that the Berkman land would probably result in yielding a profit over and above the indebtedness caused it to be handled in the name of Fowler for the purpose of realizing this profit personally and diverting it to his wife rather than to the Bank, and that the use of Fowler's name and the manner in which it was handled was intended only as a subterfuge, then the defendant Ferguson when he received profits from such property, would be guilty of abstracting the same from the Bank. On the other hand if it was placed in Fowler's name in good faith and handled as a bona fide transaction and not as a subterfuge it would not be an act of abstracting money from the Bank." (R. 468).

The jury had just heard Ferguson testify that he considered it a good investment to put $1250.00 of his wife's money into the land subject to the Bank's indebtedness; necessarily he believed "that the Berkman land would probably result in yielding a profit over and above the indebtedness"; not only that but that the land would probably result in yielding a profit over and above the $1250.00 which he had put into it in addition to the indebtedness; and because of that

"he caused it to be handled in the name of Fowler for the purpose of realizing this profit personally and diverting it to his wife rather than to the Bank."

The jury could only have understood from this charge taken with the testimony of Ferguson that he was guilty of abstracting money from the Bank.

Of what avail was it to Ferguson that the District Judge, following these instructions which were equivalent to a pronouncement from the Bench, that he was guilty of abstracting money from the Bank, instructed the jury on "good faith" and "it was incumbent on the government to prove beyond a reasonable doubt that at the time the land in question went into the name of Fowler that it was H. W. Ferguson's intent and purpose that the same should at the time be henceforth held by him as trustee for the land bank"?

The record in this case shows that your petitioner was rough handled in his trial in the District Court. That the United States District Judge holding to the view that the President of a Joint Stock Land Bank organized and operating under the Federal Farm Loan Act who purchased with his wife's money from the fee owner of a tract of land incumbered with a lien in favor of the Bank to secure a loan, was guilty under Section 984, Title 12, U. S. C. of abstracting and embezzling monies from the Bank when he collected the proceeds resulting from the land and paid the same to his wife instead of to the Bank; the lien of the Bank

not having been endangered by the transaction but having been kept in full force and effect until the Bank's indebtedness was finally paid off in full principal and interest, erroneously gave to the jury instructions not only not warranted by but actually in conflict with the uncontroverted evidence; instructions which were contrary to elementary principles of corporation and land law; instructions which were a denial from the Bench of your petitioner's testimony to the jury; instructions which obscured, confused and misled the jury; instructions which could only have been understood by the jury as meaning that your petitioner was guilty of the offenses charged in the indictment and which prevented any possibility of a consideration by the jury of your petitioner's defense or even of his testimony given in aid of said defense; and finally, instructions which as said by the Circuit Court of Appeals on the former appeal "tended to impress the jury with the idea that Ferguson's position of trust prevented any possibility of the land and the monies arising from it belonging to anyone but the Bank". (112 Fed. (2d) 132).

The record shows that the jury by their verdict simply rubber stamped the verdict of guilty which had been pronounced by the District Judge.

The Honorable Circuit Court of Appeals erred when it said "We have carefully read and considered the entire charge of the Court and have found that it con-

tains no error prejudicial to the rights of this appellant."

The Honorable Circuit Court of Appeals in affirming the judgment of the District Court sanctioned an excessive, unjust and cruel sentence of eighteen months in the penitentiary and $10,000.00 fine, resulting from a construction of a Federal Penal Statute by the District Judge which was not warranted, and erroneous as applied to the acts of your petitioner which in every respect were legal as shown by this record.

III.

Wherefore, your petitioner respectfully submits that this case is one calling for the exercise by This Court of its supervisory powers by granting the Writ of Certiorari prayed for and thereafter reviewing and reversing the decision of the Circuit Court of Appeals.

HARRY P. LAWTHER,
MAURY HUGHES,
WM. M. CRAMER,
Counsel for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Delaney v. *United States*, 263 U. S. 586, 589–590 9

Ferguson v. *United States*, 112 F. (2d) 132 3

Statute:

Federal Farm Loan Act, c. 245, Sec. 31, 39 Stat. 360 (12 U. S. C., §984) 2

402318—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 196

H. W. FERGUSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 528–30) is reported in 119 F. (2d) 582. The opinion of the court on a prior appeal is reported in 112 F. (2d) 132.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 6, 1941 (R. 530) and a petition for rehearing was denied May 31, 1941 (R. 556). The petition for a writ of certiorari was filed June

20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence, that petitioner had converted to his own use money of the joint stock land bank, to warrant submission of the case to the jury.

2. Whether the trial court erred in its instructions to the jury.

STATUTE INVOLVED

Section 31 of the Federal Farm Loan Act, c. 245, 39 Stat. 360, 382 (12 U. S. C., § 984) provides:

> Any person connected in any capacity with any * * * joint stock-land bank, who embezzles, abstracts, or wilfully misapplies any moneys, funds, or credits thereof * * * with intent * * * to defraud such institution * * * shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding five years, or both.

STATEMENT

On September 18, 1939, petitioner, together with one Craddock, was indicted in the United States District Court for the Northern District of Texas. The indictment was in six counts and charged a

conspiracy to violate and violation of Section 31 of the Federal Farm Loan Act (12 U. S. C. § 984) by feloniously abstracting and converting to petitioner's own use moneys belonging to the Dallas Joint Stock Land Bank, of which he was president (R. 1–11). After conviction on the first trial, the circuit court of appeals reversed and ordered a new trial because of faulty instructions. *Ferguson* v. *United States,* 112 F. (2d) 132 (C. C. A. 5th). On retrial there was a second verdict of guilty, and petitioner was sentenced generally on all counts to imprisonment for eighteen months and a fine of $10,000 (R. 14–16). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 530).

The Government's case may be summarized as follows:

The land bank held a note of Carrie Berkman secured by a mortgage on her farm in Nueces County, Texas (R. 29, 90, 91). The loan became delinquent, and the bank pressed for payment (R. 25, 72, 92, 413). She offered to surrender the land for the debt (R. 29), but petitioner refused (R. 30). Thereupon Mrs. Berkman offered to pay $1,000 and give a deed to the property in cancellation of the indebtedness (R. 33).

Mrs. Berkman's farm was within "five miles of a big oil field" (R. 328, 438), and petitioner knew that there "was a right hot oil play down there" (R. 239). Upon receipt of her offer, peti-

tioner instructed the bank's attorney to accept it but "instead of having Mrs. Berkman deed the property directly to the bank," told him to "Have her deed it to a nominee for the bank, and we will give her a release of personal liability * * * on the payment of $1,000" (R. 239). Petitioner also instructed the attorney to designate as the "nominee" S. K. Fowler, a farmer on some of the bank properties nearby (R. 240), although Fowler knew nothing about the transaction (R. 170).

The attorney immediately complied with petitioner's instructions (R. 240) and advised Mrs. Berkman's attorney that if she would "convey the property free and clear of all liens to a nominee of the land bank and pay $1,000 the land bank will deliver to her a release of all personal liability on the note" (R. 33–34). This offer was accepted, and on March 30, 1937, Carrie Berkman conveyed her land to Fowler, subject to the bank's mortgage lien (Gov. Ex. 16, R. 83–84), and on April 5, 1937, the bank gave her a release (Gov. Ex. 11, R. 38–39).

Within three weeks thereafter, petitioner's brother-in-law, C. R. Craddock, who was employed as a field man by the bank (R. 318, 319),[1] negotiated an oil and gas lease on the property (R. 329) dated April 28, 1937 (Gov. Ex. 25, R. 180–187), for which he received a check for $2,400, payable to the order

[1] Craddock was indicted as a coconspirator, along with petitioner (R. 1–11), and was convicted at a prior trial, but did not appeal (R. 342, 427, 440).

of S. K. Fowler (R. 172, 329). At Craddock's direction, Fowler endorsed the check (R. 171) and Craddock remitted the full amount, less $12 expenses, to petitioner (R. 337). On July 23, 1937, Craddock negotiated a sale of the property to one Dutschmann (R. 332, 339), who paid $500 down to Fowler (R. 339), who turned the money over to Craddock (R. 174). Also upon Craddock's instruction (R. 338), Richter, a tenant on the premises while title was in Fowler (R. 175), deposited rental moneys in the amount of $514.64 to an account in the name of S. K. Fowler, who transferred the amount by check to Craddock (R. 175, Gov. Ex. 23, R. 177). By check dated November 9, 1937 (Gov. Ex. 24, R. 178–179) Fowler similarly transferred to Craddock $3,296.77, the balance of the purchase price deposited to Fowler's credit by the purchaser (R. 178).[2] Petitioner apparently admitted that either he or his wife eventually received all of these sums, which aggregated about $6,700 (R. 421).

The deed to Fowler did not name him as trustee or nominee for anyone (Gov. Ex. 16, R. 83–84). The Government introduced evidence to show that title was conveyed to him as nominee for the bank solely to prevent a merger of the mortgage and thus facilitate a possible future sale of the property, as the bank had done in hundreds of other cases

[2] In January 1938, Dutschmann, the purchaser, paid the bank loan in full (Deft.'s Ex. No. 3, R. 304, 135).

(R. 239–247, 251). Petitioner controverted this testimony, and contended that at the time the conveyance was made to Fowler he intended Fowler to act as nominee for his wife (R. 412–422).

ARGUMENT

I

The factual issue is whether Fowler held the land as the nominee of the bank or of petitioner's wife. If the bank were the equitable owner of the land, petitioner in converting the proceeds is punishable under Section 31 for abstracting the money of the bank. But, if Fowler held as the nominee of petitioner's wife, there was no conversion of the money of the bank and petitioner's offense may here be assumed not to be punishable under Section 31.

Petitioner contends that "as a matter of law" the uncontroverted evidence in the case proves that the land was not "the property of the Bank," and that therefore the trial court erred in refusing his request for a directed verdict (Br. 1–7). In support of his position, petitioner relies upon evidence which shows little more than the admitted fact that Fowler was the holder of the bare legal title to the property, and that the transaction was handled contrary to the customary practice of the bank in calling in delinquent real estate loans. Thus, he points out that legal title to the property was not conveyed to an employee of the bank; no deed was prepared conveying legal title to the bank and Fowler exe-

cuted none; the loan was not closed nor was the land put into the real estate account; the attorney for the bank asked petitioner if he or Fowler wanted an opinion as to Fowler's legal title; Mrs. Berkman's release recited that legal title "is now vested" in Fowler, subject to the bank's lien; the bank clerk made a notation of the change of titleholder on the loan record; and, Deutschmann, the ultimate purchaser, finally discharged the balance due on the Berkman note (Br. 2–5).

These circumstances, it may be assumed, constitute a factual basis from which the inference might be drawn that the interest of the bank in the property was no more than that of a lienholder.[3] But other evidence in the record which petitioner ignores, related directly to the ultimate issue of fact in the case, i. e., whether Fowler, in holding legal title "was in truth and in fact the nominee of the bank" (R. 466), and plainly required submission of the question to the jury. Thus, McCombs, the attorney for the bank who performed the legal services connected with the Berkman-Fowler

[3] Contrary to petitioner's impression (Br. 6), no one has contended that the bank "became the fee owner of the land" by virtue of the conveyance to Fowler. The indictment alleges that "Fowler was holding the title to said land in trust" (R. 4) and as the trial court charged, the bank acquired the "equitable ownership of the land" (R. 466). Indeed, that there should be no merger of the bank's title as lienholder in the "fee ownership," such as petitioner suggests, was the very purpose of resorting to the nominee device (R. 243–244, 248).

transaction, unequivocally testified that "instead of having Mrs. Berkman deed the property direct to the bank," petitioner instructed him to "Have her deed it to a nominee *for the bank*" (R. 239, 247, 251). McCombs immediately complied with these instructions (R. 240) and advised Mrs. Berkman's attorney that if she would "convey the property free and clear of all liens to a *nominee of the land bank* and pay $1,000" the bank would release her from all liability on the note (R. 33–34).[4] This testimony alone, although contradicted by petitioner, was clearly sufficient to send the case to the jury,[5] for, as the court below held "the credibility of the witnesses and the weight to be given to their testimony were questions exclusively for the jury" (R. 529).

---

[4] McCombs testified that in preparing the conveyance to Fowler, he did not insert "nominee, trustee, or anything of that nature, after Mr. Fowler's name" for the reason that "I had studiously schooled myself not to use the word 'trustee' because I was very anxious never to get the land bank into a lawsuit over a parole trustee" (R. 241, 264).

[5] There is nothing in the record to support petitioner's assertion that "McCombs' testimony was so contradicted by all the facts proven in the case * * * as to be of no probative force, and not entitled to go to the jury for its consideration" (Br. 6). Petitioner's reference to the witness's testimony concerning his prior denial to Pope that Fowler was holding the land as trustee for the bank (Br. 4) omits the witness's explanation that the statement was technically true (R. 264) and that at the time it was made he believed that the transaction "was open and aboveboard in every respect" (R. 263).

The jury has decided the issue adversely to petitioner, and the Circuit Court of Appeals, after twice reviewing the evidence, has found it sufficient (R. 529; 112 F. (2d) 132). No reason appears why this Court should review it again. *Delaney* v. *United States,* 263 U. S. 586, 589–590.

II

Petitioner contends that the trial court erred in its instructions to the jury (Br. 7–15). Upon the prior appeal, the conviction was reversed because the Circuit Court of Appeals was of the view that the judge's charge virtually instructed the jury that Fowler was in fact the nominee for the bank and not for petitioner or his wife (112 F. (2d) at 134–135). In the present case the Circuit Court of Appeals rejected petitioner's argument that the instructions given contain the same vice and held that the present charge "contains no error" prejudicial to petitioner's rights (R. 530).

1. At the first trial, the trial court charged that the uncontroverted evidence showed:

> That instead of conveying the land directly to the Bank they conveyed it to a person to be named by the Bank, called a nominee *for the Bank* * * *. [Italics added.]

The Circuit Court of Appeals criticized this instruction because "the jury were told in effect that Fowler took for the Bank and not for Ferguson" (112 F. (2d) 134). Petitioner complains that the

same instruction was given on the second trial (Br. 8). Then, however, the words "for the bank" were omitted, and the jury were simply told that the land "was to be conveyed to a person to be named by the bank, called a nominee" (R. 463), a fact which petitioner does not dispute.

2. Petitioner next complains (Br. 8–9) of the court's charge that

> The defendant Ferguson was President of the bank and as such was without power to take anything that was the bank's and name someone as trustee to hold for him personally or for his wife (R. 465).

The Circuit Court of Appeals criticized substantially identical language in the charge on the first trial, but only because contextually it implied that petitioner was without authority to designate Fowler as trustee for himself or his wife.[6] In the present case, however, at petitioner's request, the court charged the jury to acquit (a) if they did not believe "beyond a reasonable doubt that at the time" of the conveyance to Fowler, it was petitioner's then "intent and purpose" that the property should thenceforth be held by Fowler "as trustee for the land bank"; or (b) if they believed

---

[6] It said (112 F. (2d) at p. 135):
"The last sentence, while true of anything that was really the Bank's, would be understood, in the connection in which it was spoken, as meaning that the land before it was deeded to Fowler was the Bank's, and Ferguson was therefore without power to make Fowler his trustee."

that petitioner collected and paid over the proceeds of the property to his wife "in good faith, believing that said moneys were the property of his wife" (R. 13, 14, 474). As the Circuit Court of Appeals pointed out, these instructions, which were not given at the prior trial, "stated the issues in a light most favorable to Ferguson" (R. 530) and certainly dispelled any inference that petitioner could not have designated Fowler as nominee for himself or his wife.

3. Petitioner (Br. 10–13) also challenges those portions of the trial court's charge wherein it is said that "One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own" (R. 468);[7] that it is presumed "that one intends the natural and probable effect of the act that he intentionally does" (R. 467); and that a verdict of guilty would be authorized if the jury should find that petitioner, knowing or believing that the land would yield a profit "caused it to be handled in the name of Fowler for the purpose of realizing this profit personally" (R. 468).[8] Petitioner does not attack any of these

[7] The analogy which likened petitioner's relationship to the bank to that of a guardian to his ward, condemned by the Circuit Court of Appeals as inapposite (112 F. (2d) 135), was omitted from the instruction in the instant case.

[8] The court also charged (R. 468): "On the other hand, if it was placed in Fowler's name for Mrs. Ferguson, in good faith, and handled as a bona fide transaction, and not as a subterfuge, it would not be an act of abstracting money from the bank."

elementary instructions as erroneous, and clearly none was "equivalent to a pronouncement from the Bench, that he was guilty of abstracting money from the Bank" (Br. 13), as petitioner contends. The jury were properly informed that they were the sole judges of the facts (R. 472–473). The only substantial fact question involved was the petitioner's good or bad faith, and this question was specifically referred to the jury under an instruction most favorable to the petitioner (R. 474).

CONCLUSION

Petitioner had a fair trial and the verdict of the jury is supported by ample evidence. No question of importance is presented; there is no conflict of decisions.

We therefore respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
Special Assistant to the Attorney General.
HARDY K. MACLAY,
Attorney.

JULY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

Office - Supreme Court, U. S.
FILED
AUG 25 1941
CHARLES ELMORE CROPLEY
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 196

H. W. FERGUSON, *Petitioner*

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF TO BRIEF FOR THE UNITED STATES

HARRY P. LAWTHER,
MAURY HUGHES,
WM. M. CRAMER,
Counsel for Petitioner.

E. Duncan & Co., Brief Printers, Dallas

Subject Index

		Page
A.	Reply to Brief of United States	1-11
B.	Federal Land Bank of Berkley vs. Samuel S. Warren, et al, 299 U. S. 53, 78 L. Ed. 1120	12
C.	Additional Argument	12-15

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 196

H. W. FERGUSON, *Petitioner*

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF TO BRIEF FOR THE UNITED STATES

To the Honorable the Supreme Court of the United States:

I.

As your petitioner reads the brief filed herein by the United States it states (page 3) apparently as a fact proven "Mrs. Berkman's farm was within five miles of a big oil field." (R. p. 328- 438), and "Petitioner knew that there was a right hot oil play down there." (R. 239).

No witness testified and the record contains no evidence that "Mrs. Berkman's farm was within five miles of a big oil field."

The testimony was that "Mrs. Berkman's farm was about five miles from the nearest oil production," (i. e. from the nearest oil well). (R. 328).

That petitioner "knew that there was a right hot oil play down there" was the purport of the testimony of the government's witness McCombs. (R. 239). This petitioner swore "there was no market for leases in that area, because the Bank had two tracts in that immediate vicinity and there was no market for it. We were on the lookout for the sale of leases and to recover the money for the bank. (R. 419).

That there was no big oil field and no hot oil play in this area is a fact proven in that the Berkman farm was leased for oil to the Wellington Oil Company April 28th, 1937 (R. 180) and at the time O'Neil testified in September, 1940, three years and six months afterwards, the Company had never drilled an oil well on the land. (R. 227). Craddock testifying at the same time swore without contradiction that "O'Neill had told him that he had drilled a dry hole pretty close to the tract in the last two or three months." (R. 341).

II.

Also in the government's brief (pp. 3 and 4), it is stated, apparently as a fact proven, "Upon receipt of her

offer Petitioner instructed the Bank's attorney to accept it, but instead of having Mrs. Berkman deed the property directly to the Bank told him to have her deed it to a nominee for the Bank and we will give her a release of personal liability * * * on the payment of $1000.00. Petitioner also instructed the attorney to designate as the nominee S. K. Fowler, a farmer on some of the Bank's properties nearby. The attorney immediately complied with Petitioner's instructions and advised Mrs. Berkman's attorney that if she would convey the property free and clear of all liens to a nominee of the land bank and pay $1000.00, the land bank would deliver her a release of all personal liability on the note. This offer was accepted."

Again this was what McCombs testified. (R. 239).

Petitioner swore, "I told McCombs * * * that Mrs. Ferguson would take over the land and to deed it to Fowler for convenience. I talked to Charlie McCombs fully about that. I told him whose money was going to pay for it, and Mr. McCombs knew that Fowler was a big operator and honorable and I told him who he was and the purpose of the conveyance to Fowler. He knew all about it. (R. 415). I did not see that letter before it was sent. I do not think I had that letter. I instructed McCombs to say that we would accept the $1000.00 and we would release her of personal liability on the note, because I told McCombs that Mrs. Ferguson would assume the obligation or take care of the balance of the indebtedness and the taxes, * * * The first time I ever saw that

letter that McCombs wrote to Mrs. Sandbo was here in the court house last year." (R. 417).

III.

The government's Brief states: (p. 5)

The deed to Fowler did not name him as trustee or nominee for anyone. (Gov. Ex. 16-R. 83-84). The Government introduced evidence to show that title was conveyed to him as nominee for the Bank solely to prevent a merger of the mortgage; and thus facilitate a possible future sale of the property as the Bank had done in hundreds of other cases. (R. 239-247-251).

McCombs said nothing about preventing a merger of the mortgage in the reasons he gave for the Bank's having the title put in an individual rather than in the Bank. (R. 243-244).

There is nothing in the record to show that McCombs knew what the doctrine of merger in the law of real estate is.

A deed to a nominee of the Land Bank instead of a deed directly to the Land Bank would not, as a matter of law, have prevented a merger of the mortgage. A deed to a nominee, he holding only the legal title with no interest in the property and the Bank being the beneficial and real owner of the land would have as effectually merged its mortgage on the land as though the deed had been made directly to the bank.

Furthermore, when the deed was made to a nominee for the Land Bank, the rule was that said nominee executed a deed conveying the land to the Bank. (R. 53-412).

IV.

Further the Brief states (P. 7), "Mrs. Berkman's release recited that legal title is now vested in Fowler subject to the Bank's lien."

No such recital is contained in the release from the Bank to Mrs. Berkman. (R. 38).

This recital is contained in the letter dated April 5, 1937, from McCombs to the Land Bank in which he enclosed Mrs. Berkman's check for $1000.00 and a release of personal liability to be executed by the Bank in favor of Mrs. Berkman. (R. 36-37).

In this letter McCombs instructs the Bank "the title to this property is now vested in S. K. Fowler, Corpus Christi, Texas, subject to the lien in favor of the Bank."

The brief for the United States concludes "Petitioner had a fair trial and the verdict of the jury is supported by ample evidence." (Brief R. 12).

The record contains not a word of evidence either oral or written which in the slightest degree implicates your petitioner with the offenses charged in the indictment other than the testimony of McCombs.

McCombs' testimony was not only directly contradicted by your petitioner but was given the lie by his own

conduct of the Berkman transaction. He handled this as attorney for the Land Bank. Upon receipt of Mrs. Berkman's check for one thousand dollars, together with the deed from Mrs. Berkman to Fowler, he sent the check to the Land Bank in a letter in which he instructed the Bank that "the title to this property is now vested in S. K. Fowler of Corpus Christi, Texas subject to the lien in fee of the Bank." (R. 36-37).

On the same days, April 5th, 1937, he enclosed the deed from Mrs. Berkman to Fowler in a letter to your petitioner individually in which he inquired, "If either you or Mr. Fowler wants an opinion from me as to *his* title, please let me know so I may order the necessary documents and have them filed for record in Nueces County and included in a Supplement." (R. 56).

McCombs did not inform the Bank that Fowler was a nominee for the Land Bank; nor did he prepare a deed to be executed by Fowler conveying the property to the Land Bank, (R. 252) as he would have done had he understood that Fowler was the nominee of the Bank.

McCombs' testimony was further given the lie by his sworn admission that on two different occasions in July, 1938; once in the presence of Pool, the Secretary and once in the presence of your petitioner he had stated to John Pope, "I know all about that transaction. I handled the whole thing and I know that the deed to Fowler was not made in trust for the Bank; that Fowler was not holding the land in trust for the Bank." (R. 262-265).

Pope also testified that in the conversation had in the presence of Ferguson, McCombs had stated with reference to the oil lease, "that the money went to Mrs. Ferguson; that she benefited by the transaction; that Fowler was merely holding the property for Mrs. Ferguson because Mrs. Ferguson had put up a certain sum of money to bring the loan up in current form represented by taxes and by principal and interest." (R. 288-289).

Who was McCombs? And what was his motive for testifying falsely against your Petitioner?

From February 17th, 1923 to March, 1939, (R. 252), he had been a member of a law firm which had been attorneys for the Bank receiving for their services very munificent salaries which were fixed by your petitioner. For many years they had received an annual salary of $20,000; some years they had received as much as $25,000.00 or $30,000.00. The last year they served the Bank during which McCombs was head of the firm, they had been paid $17,000.00 (R. 283).

In 1937, the year of the Berkman transaction, McCombs' relationship with your Petitioner was and had been for many years very close and your Petitioner reposed all confidences in McCombs, (R. 291). At the time of the Berkman transaction McCombs and your Petitioner were the warmest of friends, (R. 455). McCombs was a stockholder in the Bank and had served on the Board of Directors for two or three years, (R. 298). The Board of Directors by resolution at the first

of each year authorized the President (your Petitioner) to hire such attorneys and at such salary as he deemed to the best interest of the Bank, (R. 279). Your Petitioner had organized the Bank in 1919 and annually since that time to the time of his conviction in September, 1939, had been by the Board of Directors each year elected President. (R. 403). He therefore had been President of the Bank during the entire period in which McCombs' law firm had been the attorneys for the Bank. By authority of the Board of Directors he personally had employed this law firm and had fixed their salary. A fact proven in the case was that for sixteen years whatever McCombs had: the clothes on his back; the food that he ate; the roof over his head had come from the hand of your Petitioner. Yet in this case where your Petitioner a friend and benefactor of long standing was on trial on a charge which involved his character, his good name, and his personal liberty, McCombs gave the only testimony upon which the Government could depend for a conviction.

What had happened?

In March, 1939, six months before the indictment was found, your Petitioner failed to renew the Bank's contract with McCombs' law firm; he discharged them as the Bank's attorneys; in simple English, he fired McCombs and his firm, (R. 406).

Not a jury in America would have convicted a dog on such testimony as McCombs'; contradicted and discredited as it was.

Nor did the jury in the instant case so convict your Petitioner.

They brought in a verdict of guilty because the District Judge in his charge iterated and reiterated that your Petitioner was guilty.

At the outset he told them that the evidence showed or tended to show that in the deed from Mrs. Berkman to Fowler that Fowler was the nominee of the land bank. (R. 463).

Thus telling them how to decide it, the Judge then submitted the issue to the jury.

Next, he instructed them that Ferguson being President of the bank was without power to take anything that was the bank's and name someone as trustee to hold for him personally or for his wife. (R. 465). Here he told the jury that the Berkman farm was the property of the Bank before Mrs. Berkman deeded the same to Fowler.

That being President of the Bank Ferguson was not at liberty to deal with the property of the Bank as though it were his own. (R. 468). He here repeats that the Berkman farm was the property of the Bank.

That in the transaction whereby he paid to the Bank $1250.00 of his wife's money putting the Berkman loan in good standing and had Mrs. Berkman deed the land to Fowler subject to the Bank's lien for the benefit of his wife Ferguson was using opportunities which came

before him to appropriate proceeds of property rightfully belonging to the Bank. (R. 468).

That the jury could presume an intent on the part of Ferguson to defraud the bank from his conduct of the transaction. (R. 467-468).

That if Ferguson knew or believed that the Berkman land would yield a profit over and above the indebtedness and caused it to be handled in the name of Fowler for the purpose of realizing this profit personally and diverting it to his wife, then, that in receiving said profits he was guilty of abstracting the same from the Bank. (R. 467-468).

A corollary to this was that if he did not believe that the investment would yield a profit; if he believed that the investment would be a loss he would not be guilty.

This is not the law.

Naturally Ferguson believed that the Berkman land would yield a profit over and above the indebtedness; otherwise, he would not have put $1250.00 of his wife's money in the land subject to the lien of the bank securing said indebtedness.

The jury has just heard him in effect so testify.

Under this instruction therefore in the minds of the jury, Ferguson by his own testimony was guilty of abstracting monies from the bank.

Accordingly, in obedience to this charge, the jury found your petitioner guilty.

Upon this verdict of guilty, the District Judge sentenced your petitioner to imprisonment in the penitentiary for eighteen months, and to pay a fine of ten thousand dollars!

This charge of the District Judge with its lengthy and out of place dissertation on the obligations of the President of a bank to its stockholders for a breach of which said stockholders could hold him liable in equity; with its statement in effect and repeated that the Berkman land even before the deed from Mrs. Berkman to Fowler was the property of the bank; with its misstatements of the evidence and its erroneous statements of the law, confused and misled the jury to your petitioner's prejudice. These identical instructions were condemned and held ground of reversal by the Circuit Court of Appeals on the first appeal of the case. (R. 112 Fed. (2d) 132).

In this case, the District Judge erroneously in effect instructed the jury that if a President of a Joint Stock Land Bank invested $1250.00 of his wife's money in a tract of land upon which the Bank held a lien for the security of an indebtedness; and the investment yielded a profit which he received and paid to his wife instead of to the bank, he violated Section 984, Title 12, U.S.C.A.

The Circuit Court of Appeals affirmed.
This was error.

This Court will grant certiorari to correct an erroneous construction of a provision of the Federal Farm Loan Act.

Federal Land Bank of Berkely vs. Samuel S. Warren, et al 292 U. S. 53; 78 L. Ed. 1120.

ADDITIONAL ARGUMENT IN SUPPORT OF APPLICATION FOR CERTIORARI

The Government's case: the prosecution, the conviction and sentence of your Petitioner, rest upon the contention that by the deed from Mrs. Berkman to Fowler the land became the property of the Land Bank.

When Mrs. Berkman executed this deed March 30th, 1937, she was the owner in fee of the land subject to the lien of the Bank to secure the payment of the Berkman note.

By the execution and delivery of this deed her fee simple title passed to Fowler subject to the lien of the Bank.

It is admitted that Fowler paid nothing for the land; was not the real owner; but held only the legal title as nominee or trustee for the beneficial or real owner subject to the lien of the Bank.

If this real and beneficial owner were the Land Bank as a matter of law, its lien on the land to secure the payments of the Berkman note would have become merged in its superior fee simple title in the land; would have been extinguished; would have ceased to exist.

There can be no debate about this proposition.

But the admitted facts were that the Berkman note and the lien of the Bank on the land to secure its payment was not extinguished; did not cease to exist; but by express provision in the release of the Bank to Mrs. Berkman (R. 38) in the deed from Mrs. Berkman to Fowler (R. 83) and in the deed from Fowler to Deutschman (R. 134) the Berkman note and the Bank's lien on the land to secure its payment were kept in full force and effect, until paid off by Deutschman in January, 1938, (R. 58).

Also a fact proven in the case is that the Bank paid Mrs. Berkman nothing for her conveyance to Fowler; no consideration passed from the Bank to Mrs. Berkman for the execution by her of the deed to Fowler.

The consideration proposed by Mrs. Berkman was the satisfaction of the Berkman indebtedness to the Bank (R. 29).

This proposition was refused (R. 30); and the Berkman note and the lien of the Bank on the land to secure the payment of the note to the Bank was kept in full force and effect during the entire period in which Fowler held the legal title.

Summed up the Government's contention is that the Land Bank paying nothing for the land became its owner when Mrs. Berkman conveyed the same to Fowler; and that throughout the time Fowler held the legal title, the Bank being the real and beneficial owner at the same time held a lien on its own land to secure the payment of a note payable to itself in full force and effect.

This is a legal absurdity.

Yet the Circuit Court of Appeals sustained this contention of the Government when it affirmed the judgment of the District Court which sentenced your petitioner to the Penitentiary for eighteen months and to pay a fine of ten thousand dollars!

Another uncontroverted fact which has been ignored by the Government and by every court which has passed upon the case is that your Petitioner paid to the Land Bank $1250.00 of his wife's money (1) to satisfy the balance of the delinquencies on the Berkman loan after the payment by Mrs. Berkman of $1000.00; (2) to pay the back taxes which had accumulated against the land; (3) to pay the July, 1937 installment of principal and interest; and (4) to pay the 1937 State, County and School District taxes on the land. (R. 420).

What was the consideration for the payment to the Bank of this $1250.00?

Mrs. Ferguson was not indebted to the Bank.

Unless, by these payments for and on account of Mrs. Berkman, she became the owner of the land by the deed from Mrs. Berkman to Fowler, subject to the Bank's lien, she was under no obligation to pay this money to the Bank. If she were the owner of the land, she was the principal obligor for the payment of the Berkman indebtedness as the Bank had released Mrs. Berkman and

the estate of Andrew Berkman of all personal libability for the payment of this indebtedness (R. 38).

Respectfully Submitted.

HARRY P. LAWTHER,
MAURY HUGHES,
WM. M. CRAMER,
Counsel for Petitioner.

(21)

FILED
SEP 13 1941
CHARLES ELMORE CROPLEY
CLERK

No. 196

In the

SUPREME COURT OF THE UNITED STATES

H. W. FERGUSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

D. A. FRANK,
HUGH W. FERGUSON, JR.,
616 Rio Grande Nat'l Life Bldg.
Dallas, Texas,
Attorneys for Petitioner.

E. Duncan & Co., Brief Printers, Dallas

In the

SUPREME COURT OF THE UNITED STATES

No. 196

H. W. FERGUSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

STATEMENT AND ARGUMENT

The government's attorneys in their brief state categorically: "Petitioner had a fair trial and the verdict of the jury is supported by ample evidence. No question of importance is presented . . . " (Br. 12.)

In the last ditch, petitioner still believes that he did not have a fair trial and that, consequently, a question of importance is presented.

From studying the facts involved and the trial court's charge to the jury upon them, it is manifest that defendant was convicted by the trial judge rather than the jury. The jury was in effect instructed to find "guilty."

Petitioner believes it always is important that justice be done. Since he is the person most profoundly affected by this injustice, he deems this injustice doubly important. The Circuit Court of Appeals concluded a similar "fair trial" unfair, that the District Judge had faltered and erred in his charge to the jury, that possible civil liability should not be the basis of criminal responsibility.

The facts—rather than the government's case—may be summarized briefly. (For they are important in showing how the trial court's conception of the law relating to them and his misconception of the facts themselves prevented petitioner from receiving fair trial.)

The land bank of which petitioner was president held a note of Carrie Berkman secured by a mortgage on her farm in Nueces County, Texas. (R. 29, 90, 91.) The loan became delinquent, and the bank pressed for payment. (R. 25, 72, 413.) She offered to surrender the land for the debt, (R. 29) but the bank (through petitioner) refused. (R. 30.) Thereupon, Mrs. Berkman offered to pay $1,000.00 and give a deed to the property in cancellation of the indebtedness. (R. 33.)

Upon receipt of her offer petitioner did either one of two things, there being directly conflicting evidence upon his action. (R. 415, 416, 417-239, 240, 241.) The crux of the case—guilt or innocence—should have been the finding by the jury upon what petitioner in this situation actually did.

The government contended in the trial that Ferguson told the bank's lawyer to accept this proposition of Mrs. Berkman's but to have her deed the property to a nominee of the bank. (R. 239.) Consequently, when this was done the property would be the bank's. The bank's lawyer, whom Ferguson had discharged several months prior to the indictment, so testified.

Ferguson contended, on the other hand, that he told the bank's lawyer that the bank did not want the land; but, since there was a fair chance of profit by paying up the delinquencies and taking title, he wanted his wife to take the risk. (R. 415, 417.) (Looking forward from this point of time the proposition was a business risk Ferguson did not think the bank ought to take (it already owned $2,000,000.00 worth of land), but which risk he was willing that his wife should take, her money being in the market for investment.) Ferguson testified that he told the bank's discharged lawyer, Charles McCombs, to accept the proposition if Mrs. Berkman would deed the property to S. K. Fowler for his wife's benefit, that she would put up the money to pay delinquencies due the bank and back taxes. (R. 417.) Witness, John Pope, corroborated Ferguson's testimony that the bank's lawyer knew all about the trans-

action, had told him so, *had told him that Fowler held in trust for Mrs. Ferguson.* (R. 288, 289.)

The bank gave Mrs. Berkman her release. Mrs. Ferguson paid the taxes and the delinquent interest on the loan, (R. 420) and later the bank's loan was paid off in full. (R. 135.)

As Ferguson thought, the land proved a good investment. Profit was made from an oil lease and the eventual sale of the property. (R. 329, 334, 335.) (It was Ferguson's contention that had he been wrong about the quality of the investment, he never would have been indicted.)

The factual question for the jury to decide was whether the bank's lawyer that Ferguson had discharged was telling the truth or whether Ferguson was telling the truth; that is, whether Ferguson told the lawyer that Fowler was to hold title for Ferguson's wife, or whether Ferguson told the lawyer that Fowler was to hold title for the bank.

Such was the question of fact the trial judge should have presented to the jury!

He did. But he *answered* the question as well! It is of his answer that petitioner bitterly and strenuously complains.

The District Judge charged the jury:

> "Therefore, one of the questions involved here, which must be determined by the Court or you, is, whose money was it? Did it belong to the bank? When Mrs. Berkman conveyed that property, for the purpose of relieving herself of liability for her debt,

was she conveying it to someone to take under control and direction by the bank, or was she conveying it to someone to have and to hold for himself, or someone else?

"Fowler never asserted any title to it, therefore he never functioned as a vendee in the transaction. There is no contention that he was a bona fide purchaser. He was either the nominee, or in a sense trustee for the equity or the profits that might flow from that land, for the bank or for the defendant Ferguson, or defendant's wife, Mrs. Ferguson. Somebody had to constitute him trustee, and he held the thing in trust for somebody.

"The defendant Ferguson was President of the bank, and as such was without power to take anything that was the bank's and name somebody as trustee to hold it for him personally, or for his wife." (R. 464-465)

The first paragraph of this portion of the charge asks the jury to whom Mrs. Berkman thought she was conveying the land. Mrs. Berkman could have thought she was conveying the land to no one but S. K. Fowler, "a nominee of the land bank," for the bank's lawyer had so written to her attorney. (R. 33; 34.) Ferguson, however, uncontrovertedly testified he had not seen this letter, did not know what language it contained. (R. 416; 417.) He had merely instructed the lawyer as above set out. Why should Ferguson, in this situation, be bound by what Mrs. Berkman thought?

In the next paragraph the judge charges the jury that Fowler held the land in trust for somebody.

In the following paragraph the trial judge tells the jury that Ferguson, as president of the bank, was without power to take anything that was the bank's and name somebody to hold it for him personally, or for his wife.

These are two vicious paragraphs.

If Fowler held the land in trust for somebody, and Ferguson was without power to name somebody to hold it for himself or for his wife (which he testified he did), then Fowler must hold it in trust for the bank. The jury could only have so understood—the charge giving what purportedly was the law in effect instructed them to find the defendant guilty.

In the third paragraph the trial court uses this language: Ferguson "was without power to take *anything that was the bank's* . . . " Of course Ferguson could not have taken anything that was the bank's and name somebody to hold it in trust for himself or wife. *Abstractly*, there is no evil in such charge. But the Berkman land, before Mrs. Berkman conveyed it, was not "anything that was the bank's." Consequently, without apparent reason, the trial judge in the preceding sentence said Fowler held the thing in trust for somebody—meaning the property Mrs. Berkman conveyed to him, then in the next breath, without distinguishing, made the statement that Ferguson was without power to take anything that was the bank's and name somebody as trustee to hold for him or his wife. The jury could only have understood that the judge was telling them that Ferguson was without power to name Fowler as trustee of *the land* for himself or wife.

At another place in his charge the trial judge again answered the issue:

"One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own. It is his duty to keep in mind always the financial or pecuniary interests of the stockholders of such institution, or those for whom he acts, and in the exercise of this duty he should give the bank's interests preference over his personal interest, wherever there should be a conflict, or he should refuse to act at all.

"And if the President of a bank fails in the performance of this duty, and uses opportunities that come before him to appropriate the proceeds of property rightfully belonging to the bank, then the bank, acting through its directors and stockholders could, at its election, hold the President liable in equity for any profit he made in thus dealing personally in a matter in which he should have dealt for the bank alone.

"You are instructed in this connection that if the defendant Ferguson, knowing or believing that the Berkman land would probably result in yielding a profit over and above the indebtedness, caused it to be handled in the name of Fowler for the purpose of realizing this profit personally, and diverting it to his wife rather than the bank, and that the use of Fowler's name and the manner in which the transaction was handled was intended only as a subterfuge, then the defendant Ferguson, when he received profit from such property would be guilty of abstracting the same from the bank.

"On the other hand, if it was placed in Fowler's name for Mrs. Ferguson in good faith, and handled

S. 623

2 of 2

as a bona fide transaction, and not as a subterfuge, it would not be an act of abstracting money from the bank.

"So if you find and believe beyond a reasonable doubt in the language of the indictment that the defendant did, within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously abstract and convert to his own use and benefit certain funds and moneys belonging to the bank, as charged in the several counts of this indictment, you will find the defendant guilty; or if you have a reasonable doubt as to such guilt, then you will acquit and find him not guilty." (R. 468; 469)

The first two paragraphs of this portion of the charge "build the jury up" for the capper, the third paragraph. The short fourth paragraph tersely states the possible alternative of the instruction of "find guilty" contained in the first three paragraphs.

In the first two paragraphs the trial judge dissertates upon liability of the president of a bank for using opportunities that come before him to appropriate property rightfully belonging to the bank. Here again, *abstractly* this may be the law, but the jury is bound to have understood from the language used that the trial court thought Ferguson appropriated property rightfully belonging to the bank. Whether the property—the Berkman land—belonged to the bank was really the question to be decided.

Assuming that the president had appropriated moneys of the bank rightfully belonging to the bank, then the answer of the question in the next paragraph is clear—

guilty. Of course, the transaction was handled as a subterfuge if the president of the bank failed in the performance of his duty and used opportunities that came before him to appropriate *proceeds* of property rightfully belonging to the bank. The incorrect premise is that *the property* belonged to the bank.

In still another place, at the very outset of his charge, the trial judge prejudicially and erroneously commented on the only vital issue of the case—for whom did Fowler hold title?

> "In that situation she (Mrs. Berkman) offered to give the bank the land and $1,000.00 besides, if they would release her of the debt.
>
> "The evidence shows, or tends to show, that the defendant, Ferguson, considered the land a fairly good prospect, and accepted the proposition, and accepted it in this form: That instead of conveying the land directly to the bank, it was to be conveyed to a person to be named by the bank, called a nominee. That nominee was S. K. Fowler." (R. 463)

Note that the trial judge states that Mrs. Berkman "*offered to give the bank the land,*" then further states that *Ferguson "accepted the proposition,* and accepted it in this form: That instead of conveying the land directly to the bank, it was to be conveyed to a person named by the bank, called a nominee."

If such language in the court's charge to the jury did not tell the jury straight out that Fowler held the land for the bank, then petitioner believes our language lacks adequate expression for such a thought.

In discussing this grievous error the government lightly disposes of petitioner's complaint that the jury, in the second trial just as in the first trial, were told in effect that Fowler took for the bank and not for Ferguson. (Br. p. 10) The government uses this simple language: "* * * the jury were simply told that the land 'was to be conveyed to a person to be named by the bank, called a nominee' (R. 463), *a fact which petitioner does not dispute.*" (Italics ours)

Petitioner does dispute this fact, has always disputed it, and will forever dispute it. The important thing, however, is that the *trial court did not permit defendant in either trial to dispute it.*

The only testimony that the land was to be conveyed "to a person named by the bank" was that of the bank's lawyer and a letter written by him, which Ferguson never saw nor authorized and which should not be binding on Ferguson. Ferguson and Pope testified otherwise. An issue was clearly presented.

But the trial court's error was more insidious than the government's brief indicates. As shown from the charge quoted above the trial court actually stated that Ferguson *accepted* Mrs. Berkman's proposition *to deed the land to the bank.*

Consequently, by direct comment, as above, by innuendo, by erroneous legal reasoning, by lengthy statements upon the government's side of the case, the trial court in

both cases not only in effect, but actually, told both juries that Fowler held the property for the bank. This being so of course the juries found the defendant guilty. For defendant never denied having received for his wife the proceeds from her investment. The issue as to who told the truth, Ferguson, the bank's president or its discharged lawyer, McCombs, never reached the jury. The issue whether the land was deeded to the bank or to Mrs. Ferguson through Fowler was decided by the trial judge. He told the jury that Ferguson accepted Mrs. Berkman's proposition to deed it to the bank.

And also that Ferguson was *without power* to name Fowler to hold it for him personally or for his wife. Under the Federal Farm Loan Act Ferguson, President of a Joint Stock Land Bank, did have the power to name Fowler to hold title to the land. This contrary instruction of the trial judge was an erroneous construction of this Federal Act and this Court should correct this very prejudicial error.

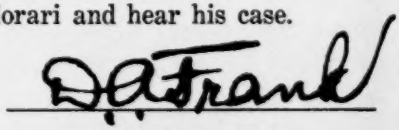
The government points out that clearly such instructions were not "pronouncements from the Bench that he was guilty of abstracting money from the Bank," and that the jury were properly informed that they were the sole judges of the facts (Br. 12). The answer to such an argument is clear in a criminal case. The situation is like that of libel—once the libel has been made, repudiations seldom cure the harm done.

In this case the judge made pronouncements in his charge that not only lead to the belief of guilt, but answered for the jury the only issue upon which guilt or innocence hung. He could not cure this evil by declaring that the jury were the sole judges of the facts.

CONCLUSION

Petitioner believes that he did not have a fair trial and that it is important, perhaps primarily to himself, but also to this court and our country that justice be done him.

He therefore prays respectfully that this court grant his petition for Writ of Certiorari and hear his case.



D. A. FRANK,
Attorney for Petitioner.

Office - Supreme Court, U. S.
FILED
NOV 6 1941
CHARLES ELMORE CROPLEY
CLERK

No. 196

In the Supreme Court of the United States

OCTOBER TERM, 1941

H. W. FERGUSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

H. W. Ferguson, Jr.,
William D. Donnelley,
Counsel for Petitioner.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

INDEX.

Subject Index.

	Page
Petition for rehearing	1
Opinions below	2
Jurisdiction	2
Question involved	2
Statute involved	3
Statement	3
Reasons for granting the writ	12
1. The trial court erroneously instructed the jury that Ferguson's position of trust prevented the transfer of the land from Mrs. Berkman to anyone other than the bank or a nominee taking title for the bank thus invading the province of the jury and taking from it the sole issue in the case	12
2. For petitioner's constitutional right to a fair trial by jury—of which he has been plainly deprived—the Circuit Court of Appeals may not properly substitute a mere right to have two trials in each of which the ultimate question of fact is effectually taken from the jury	17
Conclusion	21
Certificate of counsel	22

Table of Cases Cited.

Berger v. *United States*, 295 U. S. 78, 88, 89	16
Boatwright v. *United States*, 105 F. (2d) 737, 739	15
Cline v. *United States*, 20 F. (2d) 494, 496	15
Ferguson v. *United States*, 112 F. (2d) 132 (C. C. A. 5)	4
Gold v. *United States*, 26 F. (2d) 185, 186	16
Starr v. *United States*, 153 U. S. 114, 126	16
Williams v. *United States*, 93 F. (2d) 685, 692, 693	14, 15

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 196

H. W. FERGUSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

Comes now your petitioner, H. W. Ferguson, and prays reconsideration of his petition for certiorari to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above cause on May 6, 1941, affirming the judgment of the United States District Court for the Northern District of Texas.

This petition for rehearing is filed because it is believed that the petition for certiorari failed adequately to present, and this Court has overlooked, a novel and egregious error of law committed by the United States Circuit Court of Appeals which has deprived petitioner of his constitutional

right to a fair trial. This decision, if left uncorrected by this Court, will clearly impair and discredit in large part the statutory right to appellate review for the correction of errors by district courts. Because the effect of the decision is merely to substitute for the right of a fair trial by jury the barren right to two trials, the case presents a proper occasion for the exertion by this Court of its supervisory power.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 528-30) is reported in 119 F. (2d) 582. The opinion of the same court on prior appeal is reported in 112 F. (2d) 132.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on May 6, 1941 (R. 530). Petition for rehearing was denied by the Circuit Court of Appeals on May 31, 1941 (R. 556). Petition for certiorari was filed on June 20, 1941, and was by this Court denied October 13, 1941.

Question Involved.

Defendant, a president of a joint stock land bank, was accused of abstraction and conversion of funds of the bank in collecting the income and proceeds of land transferred by a debtor of the bank to a nominee who, defendant asserted, took title for defendant's wife, and who, the Government asserted, took title for the bank. The sole issue was this question of ultimate fact—For whom did the nominee hold title. The trial court's instructions to the jury on the first trial were held erroneous by the Circuit Court of Appeals in that they forced on the jury the impression that, because of the defendant's official position, the deed could have been only to the nominee S. K. Fowler as trustee for the land bank.

The question is whether the Circuit Court of Appeals erred in holding that on the new trial, the district court, although repeating the same erroneous instructions either verbatim or in essential substance, nevertheless preserved to petitioner his right to a jury trial by merely adding, at the conclusion of its very lengthy statement, new but necessarily inoperative admonitions that petitioner was not to be found guilty if:

1. He collected the moneys arising from the land in good faith believing that they were the property of his wife, or

2. The Government had failed "to prove beyond a reasonable doubt that at the time the land in question herein went into the name of S. K. Fowler, that it was H. W. Ferguson's intent and purpose that same should at that time be held thenceforth by him as trustee for the land bank".

Statute Involved.

Section 31 of the Federal Farm Loan Act, c. 245, 39 Stat. 360, 382 (12 U. S. C., sec. 984) provides:

> Any person connected in any capacity with any * * * joint stock-land bank, who embezzles, abstracts, or wilfully misapplies any moneys, funds, or credits thereof * * * with intent * * * to defraud such institution * * * shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding five years, or both.

Statement.

The facts are here summarized for petitioner believes that they have never been adequately presented to this Court, and also because their statement casts into sharp relief the error of law committed by the trial court. This error has prevented the jury from passing upon the only

vital issue involved and, consequently, has prevented petitioner from receiving a fair trial.

On September 18, 1939, petitioner, together with one Craddock, was indicted in the United States District Court for the Northern District of Texas. The indictment was in six counts and charged petitioner with conspiracy to violate, and violation of, Section 31 of the Federal Farm Loan Act (12 U. S. C. Sec. 984), by abstracting and converting to his own use moneys belonging to the Dallas Joint Stock Land Bank, of which he was president (R. 1-11). The first count was stricken. The next four substantive counts referred to sums received as oil-lease bonus, earnest money, additional purchase money, and crop rent. The last was a conspiracy count.

The Circuit Court of Appeals reversed the judgment on the first trial on the ground that the instructions of the trial court had in effect dictated the verdict and deprived petitioner of a jury trial. *Ferguson* v. *United States,* 112 F. (2d) 132 (C. C. A. 5). On retrial but upon instructions partially identical in form with those disapproved and altogether identical in effect, there was a second verdict of guilty. Petitioner was sentenced generally on all counts to imprisonment for 18 months and a fine of $10,000 (R. 14-16). The Circuit Court of Appeals affirmed (R. 530).

In pertinent substance the uncontradicted facts were:

Ferguson, throughout the 20 years of the Bank's existence, had been its able president. He exercised almost complete control over the bank's business (R. 403, 60-64).

In 1937 the bank held the mortgage note of Carrie Berkman secured by a mortgage on her farm in Nueces County, Texas (R. 29, 90, 91). The loan had become hopelessly delinquent; including taxes these delinquencies totaled approximately $2,200 (R. 25, 54, 59, 75, 413). Attempts to make collection had proved futile (R. 13, 22, 399). In this

situation the secretary-treasurer on March 13, 1937, requested the bank's attorneys to make collection (R. 25).

The Offer of the Debtor.—The debtor offered, but on March 16, 1937, the bank refused to accept, surrender of the land for the debt (R. 28).

On March 17, 1937, the debtor, through her attorney, addressed to Chas. S. McCombs, the bank's attorney at Dallas, a new offer to surrender the land to the bank and to pay $1,000 in cancellation of the indebtedness (R. 32, 33).

Since the bank already held in excess of 2 million dollars worth of land (R. 44, 412, 415), when McCombs presented this letter to him Ferguson was faced with a problem (R. 415). He believed the land might in the future, as a matter of possible speculation, have a greater value (R. 418). But he did not want the bank to acquire more real estate and in particular did not wish to take this land onto the books of the bank since its sales value did not equal the amount of the debt against it (R. 414). After applying on the loan's delinquencies the $1,000 payment Mrs. Berkman offered, there remained, if the loan were to be placed in current standing, approximately $1,200 additionally delinquent, including principal, interest, and taxes (R. 419, 420). The funds of Ferguson's wife were in the market for investment. If she took the land and paid up the taxes and paid all delinquent principal and interest, the bank, while obtaining substitution of no new personal responsibility, would avoid putting any more land into its real estate account. To the positive benefit of the bank, the loan would be put in current standing and the bank would be saved the expense of taxes and possible upkeep expense (R. 413, 414, 415). Not only would the bank thus avoid speculation—which it was of course Ferguson's duty as president to avoid—but it would, by virtue of the payment of $1,200 by Mrs. Ferguson, vastly improve the value of the security for its debt (R. 414, 417, 419, 420).

Actuated by these considerations, Ferguson told McCombs to make the debtor a counter proposition (R. 415, 417): That the bank would release the personal liability of the debtor in consideration of the payment of $1,000 to the bank, and Mrs. Ferguson would take over the land, put up the delinquent principal, interest and taxes, the deed to be to one Fowler for convenience (R. 415, 417).[1]

The Counter-proposition.—Pursuant to these instructions, the answer of McCombs dated March 25, 1937, did not accept the offer. It merely stated that

> after considerable discussion among *the officers* of our client *they* have decided to make you this *counter proposition.* (Emphasis supplied.)

The stated counter offer was that if Mrs. Berkman would convey the property free and clear of all liens to a *nominee of the land bank* and pay $1,000, the land bank would release her of personal liability on the note (R. 33, 34) [2]. Ferguson never saw this letter, and did not authorize the language used by the lawyer McCombs (R. 417).

This counter proposition by the officers was accepted before April 5, 1937 (R. 35, 36, 37). The bank received the $1,000 from Mrs. Berkman (R. 42) and released her from

---

[1] Fowler farmed for Ferguson a section of land near to the Berkman land (R. 407) and also was a large farm operator in the community (R. 417); and if a deal were made to sell the land, it would be convenient if Fowler there resident, rather than Mrs. Ferguson in Dallas, were the record owner (R. 417).

[2] Since the net result to the debtor was exactly the same as that contemplated by her in her offer, McCombs' reference to this as a counter proposition is accounted for only by the fact that this counter proposition is stated to come, not from the bank, but from *the officers,* and, therefore, that the nominee of the bank was to hold title for, not the bank, but the officers.

Such a counter proposition, if made on behalf of the bank itself, would have been unnecessary, for Mrs. Berkman had already offered to deed the land to the bank and pay $1,000 for release of personal liability. If the deed to a nominee of the bank was for the bank, there would have been no counter proposition, but an acceptance of Mrs. Berkman's offer.

personal liability by release dated April 9, 1937 (R. 38). Mrs. Berkman executed a deed conveying the land to S. K. Fowler, dated March 30, 1937 (R. 83).[3] On April 29, 1937, Ferguson paid out approximately $800 of his wife's money and shortly afterwards in July, approximately $336 more, against the delinquent principal and interest due the bank and delinquent taxes, making an investment in the property of about $1,200 (R. 419, 420).

Action and Letters of Government's Witness McCombs Belie His Testimony as to Effect of Transaction.—Not to show conflict in evidence but to show what a very close case was presented, it is pertinent to note that all subsequent acts of McCombs and the bank's employees upon and after April 5, 1937, clearly established that title was not vested in the bank or its nominee:[4]

a. *No deed to bank as was uniformly required where nominee held for the bank.*—When McCombs had Mrs. Berkman convey to Fowler, he did not require that Fowler give a deed over to the bank as was always done by a nominee holding for the bank, and which deed over to the bank was required by Government regulation when a nominee held for the bank (R. 55, 305, 306, 460). Yet McCombs admitted that Fowler had never before been a nominee for the bank, did not work for the bank (R. 53), and, indeed, that McCombs had never heard of him before (R. 240).

---

[3] Ferguson and Craddock testified Fowler was told beforehand, which Fowler did not deny (R. 417, 418, 324, 200).

[4] While property was frequently conveyed to the bank through a "nominee", the nominees always had been, thereafter continued to be, and were at the time of trial 2 years later, J. J. Marshall or Searcy Ferguson, employees of the bank (R. 52).

And in such transfers of land to the bank through these nominees, it was the uniform practice for the legal department immediately to secure from the nominees, and keep unrecorded in the files of the bank as a precautionary measure and upon instructions from the Federal Government (R. 53, 411, 460), another deed conveying the property over to the bank (R. 53, 411, 460, 378).

b. *The attorney instructed the bank's force that title to the property was in Fowler subject to the bank's lien.*—On April 5, 1937, he wrote a memorandum letter of instructions to the bank, with carbon copies indicating to the bank's employees the changes in the bank's records necessary to properly reflect the transaction. The memorandum states (R. 57):

> Title to this property is now in S. K. Fowler, Corpus Christi, Texas, subject to the lien in favor of the bank. We are closing our file on this item.

c. *The bank's records thereafter clearly showed that title was not held for the bank.*—In accordance with the instructions in this memorandum, J. J. Marshall, the bank's employee who first received the memorandum during its routing through the office, changed the bank's Individual Mortgage Loan Record to show title to the security to be vested in S. K. Fowler, of Corpus Christi, Texas (R. 303, 304, 305). Marshall testified that if, on the other hand, the property had been shown to be held in the name of a nominee for the bank, the land would have been placed in the Real Estate Account, and would not have been continued as an open loan on the Individual Mortgage Loan Record, as was done in this case (R. 315).

A clerk in the bank's tax department also received in the course of office routine McCombs' memorandum of instruction to the bank (R. 371). Had the memorandum indicated that Fowler held for the bank, the tax record of this property would have been transferred to the bank's Real Estate Account, showing the bank's future tax responsibility (R. 373, 375, 380). But because McCombs' instruction indicated to the employee that title was in S. K. Fowler, without the slightest intimation that he held for the bank, the bank's tax records were changed to show that title to the property was in S. K. Fowler and not the bank (R. 373, 378).

Thereafter, semi-annual maturity notices (R. 153) and tax statements (R. 68) were sent from the bank to Fowler.

The memorandum of instruction of McCombs, and the acts of the bank's employees in sole dependence thereupon, which reliance must necessarily have been contemplated by him, all recognize that title to the property had passed, not to the bank or to some one holding for it (R. 314, 315, 316), but to Fowler, holding title for himself or in trust for some one other than the bank (R. 380).

d. *By letter the bank's attorney recognized that Fowler did not hold title for the bank.*—On April 5, 1937, Chas. S. McCombs, attorney for the bank, wrote another letter concerning this transaction, this one to H. W. Ferguson enclosing the deed from Mrs. Berkman to Fowler (R. 56). In this letter he made the highly significant statement:

> If either you or Mr. Fowler wants an opinion from me as to *his title* let me know so that I may order the necessary documents and have them filed for record in Nueces County, and included in a supplement.[5]

e. *The bank's field agents in dealing with third parties clearly stated that the property was not that of the bank.*—During the week of April 8 to 15, 1937, Craddock and C. W. Riley, both fieldmen of the bank, went to the office of John G. O'Neal, President of the Wellington Oil Company (R. 221, 225). The purpose of the visit was to try to lease to that company two tracts of land in which the bank had an interest. Craddock, the brother of Mrs. Ferguson, also dis-

---

[5] The attempted explanation by McCombs that sometimes a prospective purchaser wanted a letter from his firm that title was good, and that if Ferguson, the bank or Fowler wanted such letter he would give it to them (R. 258, 259), is conclusively rebutted by the fact that Marshall, a Government witness, one of the bank's regular nominees, and the employee charged with supervision of title records of the bank (R. 307), testified that such a letter was never received by him in relation to titles which the regular nominees held for the bank (R. 316).

cussed the leasing of the land here in question (R. 221, 225, 330). Craddock and Riley, when discussing the ownership of the three parcels of land with Mr. O'Neal, definitely stated that one belonged to S. K. Fowler, another to the Dallas Joint Stock Land Bank, and the third to a farmer named Melte (R. 224, 330). Craddock did not represent that the Fowler land belonged to the bank (R. 224, 225, 330). Instead, knowing that Fowler held title for his sister, he declared to Mr. O'Neal that this tract belonged to S. K. Fowler, and distinguished it from land belonging to the bank (R. 224, 225, 330).

Later, all three tracts were leased (R. 221), the lease on the Fowler tract being dated on April 28, 1937, but not being actually closed until May 10, or May 11, 1937 (R. 223). The Wellington Oil Company paid $2,400 for this lease (R. 223) which Ferguson put to his wife's credit. Absolutely no negotiations by Ferguson or Craddock to lease the Fowler land occurred prior to April 8 (R. 226). And O'Neal, Ferguson, and Craddock, all definitely established the fact that the oil company was not a prospect for the lease when Ferguson told McCombs that his wife would take title to the land through Fowler (R. 419, 329, 226).

Subsequently, in July (R. 117, 118, 119), the property was sold to a purchaser who assumed the mortgage and paid a total of $3,796 which Ferguson put to his wife's credit, together with the rent on the land for 1937 of $514 (R. 421).

f. *McCombs admitted in 1938 that the deed to Fowler was not in trust for the bank.* A year later in 1938 a Dallas lawyer named John Pope, who represented Ferguson (R. 287, 289), heard a rumor that Ferguson had illegally made some money out of the Berkman loan (R. 296), and was referred to McCombs by Ferguson (R. 288). McCombs at that time told Pope that the deal was all right, that he

knew all about it, that Fowler held the property in trust for Mrs. Ferguson (R. 288, 289, 299), and that, therefore, she received the oil and gas lease money from the Wellington Oil Company (R. 289). And upon cross-examination McCombs admitted that he told Pope the deed to Fowler "was not made in trust for the bank" (R. 262).[6]

Two years later, in 1939, Ferguson, on his sole responsibility, discharged McCombs, not only from a $17,000 per year retainer from the bank but also as his own lawyer (R. 406, 407). McCombs then sued Ferguson individually, dismissed and immediately refiled (R. 407).

On September 18, 1939, a few months after McCombs' discharge, the indictment in this case was filed (R. 1). And upon trial McCombs was the only Government witness who testified that the transaction was not made as Ferguson said (R. 252).

On this state of the evidence, it was clear that because the bank's loan was involved and it was dictating the terms of settlement with Mrs. Berkman, her grantee, whoever he might be, must necessarily be the nominee *of* the bank. The sole question for determination by the jury, therefore, was the narrow factual question: Whether Fowler in taking title from Mrs. Berkman as nominee of the bank took (1) as nominee *for* the bank—i. e. as agent or trustee to hold title for the Bank, or (2) as nominee to hold title for Ferguson's wife.

But the trial court, ignoring the strictures of the opinion of the Circuit Court of Appeals in reversing the first judgment, persisted in instructing the jury that Ferguson's

[6] In attempted explanation of these conversations with Pope, McCombs first testified that he told Pope he had prepared a deed to a nominee for the bank (R. 251, 252), but upon cross-examination he testified that he told Pope the deed to Fowler "was not made in trust for the bank" (R. 262). McCombs' attempted explanation of this latter statement, that he, at that time, had no apprehension there was anything the matter, is illogical and evasive. For there could not have been anything the matter were his statement to Pope true.

position of trust prevented any possibility of the land and the moneys arising from it belonging to anyone but the bank (R. 462-474).

Upon a verdict of guilty, petitioner received a sentence of 18 months imprisonment and $10,000 fine.

The Circuit Court of Appeals affirmed. 119 F. (2d) 582.

Reasons for Granting the Writ.

1. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT FERGUSON'S POSITION OF TRUST PREVENTED THE TRANSFER OF THE LAND FROM MRS. BERKMAN TO ANYONE OTHER THAN THE BANK OR A NOMINEE TAKING TITLE FOR THE BANK, THUS INVADING THE PROVINCE OF THE JURY AND TAKING FROM IT THE SOLE ISSUE IN THE CASE.

It may be conceded that Ferguson in attempting to deal with this property, with respect to which he acted in a dual capacity, was very ill-advised and, had the bank elected (as it did not) undoubtedly would be required to account in equity for the profits realized. cf. *United States* v. *Wise*, 108 F. (2d) 379, 382. But, as the Circuit Court of Appeals recognized in its first opinion, 112 F. (2d) 132, 134, criminal liability here in question depends on whether the land became the land of the bank in March, 1937, for if, on the contrary, the land in fact was that of Mrs. Ferguson after that date, the petitioner was clearly innocent in appropriating to her the moneys derived from it.

The error of the district court lies in its persistence, after being once corrected by the Circuit Court of Appeals, in instructing the jury that petitioner's position as president of the bank prevented the deed by Mrs. Berkman from vesting title in anyone other than the bank.

It is true that the court in exactly the same words as used at the first trial did correctly state the issue as follows (R. 464-465):

> When Mrs. Berkman conveyed that property, for the purpose of relieving herself of liability for her debt, was she conveying it to someone to take under control and direction by the bank, or was she conveying it to someone to have and to hold for himself, or someone else?

But this statement was lost in the court's repeated instructions—not only in his recitations of what the evidence showed but of fixed rules of law—impressing on the jury that because of Ferguson's position as President of the bank it was not possible for him to cause title to the land to be transferred from Mrs. Berkman to a trustee for Ferguson individually or for Mrs. Ferguson. This amply appears from the following (R. 463):

> In that situation she [Mrs. Berkman] offered to give the bank the land and $1,000 besides, if they would release her of the debt.
>
> The evidence shows, or tends to show, that the defendant, Ferguson, considered the land a fairly good
> "A" prospect, and *accepted* the proposition, and accepted it in this form: That instead of conveying the land *directly* to the bank, it was to be conveyed to a person to be named by the bank, called a nominee. That nominee was S. K. Fowler (R. 465). (Emphasis supplied.)
>
> He [Fowler] was either the nominee, or in a sense trustee for the equity or the profits that might flow from that land, for the bank or for the defendant Ferguson, or defendant's wife, Mrs. Ferguson. Somebody had to constitute him trustee, and he held the thing in trust for somebody.
> "B" The defendant Ferguson was President of the bank, and as such was *without power* to take anything that was the bank's and name somebody as trustee to hold it for him personally, or for his wife (R. 465). (Emphasis supplied.)

"C" If the defendant Ferguson took the land for the bank in Fowler's name, then the bank's equitable ownership of the land and its proceeds would not cease * * * (R. 466).

"D" One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own (R. 468).

The case turned upon whether the bank had accepted the offer of Mrs. Berkman or whether Mrs. Berkman had accepted the counter-offer of Ferguson. But, in item "A", although the case was a very close one, the court told the jury that the debtor "offered to give the bank the land", and that Ferguson "accepted the proposition" (viz., the giving of the land to the bank) with the modification that "instead of conveying the land *directly* it was to be conveyed to a person named by the bank, called a nominee". (Emphasis supplied.)

Paraphrased, but with no change in meaning, the court thus instructed the jury: "Mrs. Berkman offered to give the bank the land, which proposition was accepted, but the manner in which the property was deeded to the bank was indirect, rather than direct". Thus, at the very beginning the jury was instructed that Fowler took title to the land for the bank.

Here, as to the very crux of the case—the ultimate issue upon which the whole case solely pivoted—the court stated only the Government's testimonial evidence, omitting entirely petitioner's well-nigh conclusive documentary evidence which showed that the offer of Mrs. Berkman was not accepted—that a "counter-proposition" was made. (See R. 33, 34, referred to *supra*, p. 6.) This clearly violated the established rule that when a Federal trial judge undertakes to summarize the evidence at all, he may not state only the facts on one side of the issue but must be fair and adequately call to mind the evidenec of both sides. *Williams* v. *United*

States, 93 F. (2d) 685, 692, 693; *Cline* v. *United States,* 20 F. (2d) 494, 496; *Boatwright* v. *United States,* 105 F. (2d) 737, 739.

The prejudice here was aggravated because there was no substantial difference as to the other pertinent facts. This question of the nature of the agreement of the parties at the time of the deed by Mrs. Berkman was the single issue of ultimate fact upon which all depended. Therefore, it was particularly incumbent on the court, having once undertaken to summarize the evidence, to state the evidential facts presented by the defendant as well as the oral testimony of the Government's witness which, indeed, was more conclusory than evidentiary in nature.

But the other parts of the instructions above quoted make it clear that, even were the jury, despite the court's narration, to take another view of the evidence, the court's injunctions as to controlling principles of law effectually eliminated any remaining possibility that the jury might pass upon the fact issue presented.

The second sentence in item "B" *supra,* charging that Ferguson was President of the bank and as such was without power to take anything that was the bank's, while true in the abstract, must necessarily have been understood by the jury as meaning that the land, before it was deeded to Fowler, was the land of the bank and Ferguson therefore could not make Fowler trustee for Mrs. Ferguson. The Circuit Court of Appeals so held on the first appeal. 112 F. (2d) 132, 135.

And if there could have then remained in the mind of the jury any doubt that the land, even before the deed to Fowler, was to be regarded as the bank's it must have been conclusively removed by the further instruction (item "C"), *supra*:

> If the defendant Ferguson took the land for the bank in Fowler's name, then the bank's equitable ownership of the land and its proceeds *would not cease* • • •

The court thus clearly instructed that at all events, and before the transfer, there was an equitable ownership or title in the bank. Taking items "C" and "D" together and in view of item "B", it is difficult to imagine a more plain and direct holding that before the deed from Mrs. Berkman the equitable title to the land was in the bank and because it was in the bank Ferguson, being the President of the Bank, was without power to name some one to hold it for him personally or for his wife.

In view of the prior instructions, item "D", *supra,* directing that—

> One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own—

served only to emphasize to the jury that since the bank had equitable title to the property, Ferguson was not at liberty to cause it to be transferred to Fowler as nominee for Mrs. Ferguson.

In a case such as this where the evidence is close and the guilt of defendant highly doubtful, it is plain that any error of substance must of necessity grossly prejudice the defendant. *Starr* v. *United States,* 153 U. S. 114, 126; *Berger* v. *United States,* 295 U. S. 78, 88, 89; *Gold* v. *United States,* 26 F. (2d) 185, 186.

It is obvious that in instructing the jury that Ferguson was without power to cause the Berkman property to be transferred to a nominee in trust for Mrs. Ferguson, the court on the second trial clearly erred as a matter of law (as the Circuit Court of Appeals conceded on appeal from the judgment on the first trial) and effectually deprived the petitioner of his constitutional right to have the jury determine from all the evidential facts whether the nominee's title was held for Mrs. Ferguson at the time of receipt of the moneys here in question.

2. FOR PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY JURY—OF WHICH HE HAS BEEN PLAINLY DEPRIVED—THE CIRCUIT COURT OF APPEALS MAY NOT PROPERLY SUBSTITUTE A MERE RIGHT TO HAVE TWO TRIALS IN EACH OF WHICH THE ULTIMATE QUESTION OF FACT IS EFFECTUALLY TAKEN FROM THE JURY.

Petitioner recognizes that what to him is all important is not necessarily a question of such importance as to justify review by this Court.

Here, however, it is plain that the Circuit Court of Appeals at first vindicated the right of petitioner to a jury trial by pointing out specifically, and condemning, statements of the trial court which clearly took the sole fact issue from the jury. On the new trial ordered by the Circuit Court of Appeals, the district judge has lightly overruled the appellate court, and has given word for word the very instructions criticised by the appellate court. And now on appeal, the Circuit Court of Appeals has held that no right of petitioner has been impaired. Thus, petitioner is in the position of having expended large sums in pursuit of what it now appears was but a legalistic phantom. For his right to a fair trial—it now develops—is but a right to two trials. Having secured him that, the appellate court is no longer interested.

In thus abandoning its duty to protect petitioner's right to a jury trial, it is submitted that the Circuit Court of Appeals has so far departed from the proper course of judicial proceedings—at the same time sanctioning a departure by the lower court from the accepted and usual course of judicial proceeding—as to call for the exercise of this Court's power of supervision.

Instructions "A" and "B", above quoted, are, with change insignificant in effect, verbatim restatement by the trial court of two of the four instructions which were the specified ground for reversal on the first trial:

A.

First trial (112 F. (2d) 132, 134):

In that situation she [Mrs. Berkman] offered to give the bank the land and $1,000 besides if they would release her of the debt. The evidence shows that Mr. Ferguson—that the defendants, Ferguson and Craddock, considered the land a fairly good prospect, and *accepted* it in this form. That instead of conveying the land *directly* to the bank that they convey it to a person to be named by the bank, called a nominee, or for the bank. That nominee was S. K. Fowler. (Emphasis supplied.)

Second trial (R. 463):

In that situation she [Mrs. Berkman] offered to give the bank the land and $1,000 besides, if they would release her of the debt.

The evidence shows, or tends to show, that the defendant, Ferguson, considered the land a fairly good prospect, and *accepted* the proposition, and accepted it in this form: that instead of conveying the land *directly* to the bank, it was to be conveyed to a person to be named by the bank, called a nominee. That nominee was S. K. Fowler. (Emphasis supplied.)

The Circuit Court of Appeals, upon first appeal, commented: "Thus in the very beginning the jury were told in effect that Fowler took for the bank and not for Ferguson."

The second instruction similarly criticized but nevertheless repeated by the trial court was:

B.

First trial (112 F. (2d) 132, 134):

He [Fowler] was either the nominee, or in a sense trustee for the equity or the profits that might flow from that land, either for the bank or for the defendant Ferguson. Somebody had to constitute him trustee. He could not arrogate that to himself without his consent, or without his knowledge.

The defendant Ferguson was *without power* to take anything that was the bank's and name somebody as trustee to hold it for him personally. (Emphasis supplied.)

Second trial (R. 465):

He [Fowler] was either the nominee, or in a sense trustee for the equity or the profits that might flow from that land, for the bank or for the defendant's wife, Mrs. Ferguson. Somebody had to constitute him trustee, and he held the thing in trust for somebody.

The defendant Ferguson was President of the bank, and as such was *without* power to take anything that was the bank's and name somebody as trustee to hold it for him personally, or for his wife. (Emphasis supplied.)

Of this the Circuit Court of Appeals, on first appeal, said: "The last sentence while true of anything that really was the bank's would be understood, in the connection in which it was spoken, as meaning *the land before it was deeded to Fowler was the Bank's,* and Ferguson was therefore without power to make Fowler his trustee." (Emphasis supplied.)

Plainly, the petitioner in obtaining a new trial realized the form and was deprived utterly of the substance of a fair trial by jury.

While instructions "C" and "D" above quoted, p. 14, were new on the second trial, and therefore were not criticized on the first appeal, the fact of their addition by the trial court is pertinent because they so closely compare with, and force the verdict of the jury as much as, a supplemental instruction to the jury on the first trial which was the subject of criticism on appeal (112 F. (2d) 132, 135):

Supplemental instruction:	Upon second trial:
I instruct you in reply to that question,[7] gentlemen, that the defendant Ferguson acting as trustee for the bank did not have the right to convey the property to his wife. He did have the right, if the property was his, to give it to her, but he did not have the right as trustee for the bank to do so.	"C". If the defendant Ferguson took the land for the bank in Fowler's name, then the bank's equitable ownership of the land and its proceeds would not cease • • • (R. 466). "D". One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own (R. 468).

Of this supplemental instruction the Circuit Court of Appeals said: "If it "the property" meant the land at the time Fowler received it, it [the instruction] was wrong as applied to this case. We think it likely the jury intended it to mean the land, and thought the case ruled by the judge's answer, for they soon made a verdict."

---

[7] The question of the jury was: "Did Ferguson, acting as trustee for the bank, have the right to convey this property to his wife through S. K. Fowler?"

We submit that the last part of the new instruction "C" plus the statement in "D" in so many words likewise told the jury that, even before the conveyance to Fowler, equitable ownership of the land was the property of the bank and, as president of the bank, Ferguson was not at liberty to deal with it as his own.

It is thus apparent that by retaining certain of the criticised instructions verbatim and in other instances by substituting new instructions of the same import the district court perpetuated the error and at the same time succeeded in vindicating the correctness of its instructions on first trial although they had been held erroneous by the Circuit Court of Appeals.[8]

Inoperative instructions.—Briefly dismissing petitioner's contentions of error on second appeal, the Circuit Court of Appeals reasoned and the Government in its Brief in Opposition, p. 10, 11, here argued that there was no error because the trial court had given two requests of the defendant which it said "stated the issues in a light most favorable to" him.

But these two issues:

(1) Whether Ferguson collected the moneys arising from the land in good faith believing that they were the property of his wife, and

---

[8] It is not to be overlooked that on the first appeal the Circuit Court of Appeals said (112 F. (2d) 132, 134):

> But we think the court, impressed with Ferguson's accountability in equity as an agent and fiduciary of the bank, erroneously made and refused charges on the critical question.

Whether or not motivated by intent to make the same impression on, and thus influence, the jury on the second trial, it is pertinent to note that the trial court took occasion in the instructions on the second trial to add a statement on the unconditional civil liability of Ferguson to the bank—an instruction which, of course, had no relevance to the question at issue and could only serve to influence the jury against the defendant (R. 468).

(2) Whether Ferguson intended, at the time of the deed, that Fowler hold the land as trustee for the land bank, were not fairly before the jury.

Whether from bias or ingenuousness, the trial court had already erroneously instructed the jury that Ferguson *accepted* Mrs. Berkman's proposition to deed the land to the bank, and further that Ferguson was *without power* to make Fowler his wife's trustee; further, that Ferguson was civilly liable to the bank (R. 468); that the bank's equitable ownership of the land existed before the deed to Fowler, and further, that Ferguson, the President, could not deal as though it were his own with property of the bank (meaning the bank's equitable ownership of the property in question).

Obviously, with such instructions ringing in their ears, the jury could only conclude that in taking money from the land Ferguson had acted in bad faith. For no other conclusion could be reconciled with the court's instruction that *the offer to deed the land to the bank* was accepted.

And equally as apparent, the jury had no fair opportunity to pass upon the second requested charge *i. e.*, whether Ferguson intended at the time for Fowler to hold for the bank. Ferguson must necessarily have so intended (the jury undoubtedly reasoned) if, as the judge charged, he accepted Mrs. Berkman's offer to deed the land to the bank. In the minds of the jury and as a matter of logic, these two instructions, could have had no operative effect in securing a fair trial, coming as they did, at the end of a charge which had already inevitably precluded a finding for the defendant on the vital question of fact.

Conclusion.

In a criminal case, therefore, in which liberty and stigma are involved, petitioner received two trials—but not two,

nor even one, fair trial. All he asks is one fair trial—a trial in which the jury are not bindingly instructed that he accepted the land for the bank, and that, as President, he was without power to make Fowler his trustee, a trial in which civil liability is not made an issue for the jury, a trial in which the judge, in his charge, discusses evidence of innocence as well as of guilt.

To preserve the worth of appellate review and the Constitutional right to fair trial, this Court should, even at this last hour, exercise its supervisory power over this case. Petitioner prays only his fundamental right—a trial by jury.

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted, and that the petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit be, upon further consideration, granted.

Respectfully submitted.

HUGH W. FERGUSON, JR.,
WILLIAM D. DONNELLY,
Counsel for Petitioner.

November, 1941.

Certificate of Counsel.

I, William D. Donnelly, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM D. DONNELLY.